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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

480.00 ACRES OF LAND and
GILBERT A. FORNATORA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When it is alleged that the federal government has induced local authorities to increase regulation of property the United States then condemns, and the property owner seeks to have the regulation's effects disregarded in calculating just compensation under the "scope of the project" rule, must the owner show the federal government's sole motive or primary purpose was to depress land value, as held by the Second, Third, Fifth, and Eleventh Circuits, or merely demonstrate a nexus between the regulation and the condemnation, as held by district courts in the First and Fourth Circuits?

2. What standard governs due process claims under the Fifth Amendment, where a property owner alleges that the federal government has manipulated the Fed. R. Civ. P. 71.1 land commission process to artificially depress just compensation payments by denying an owner a meaningful opportunity to be heard?

LIST OF ALL PARTIES

Pursuant to Rule 14 (b), the following is the list of all parties to the proceeding in the Eleventh Circuit judgment Petitioners seek this Court to review:

480.00 Acres of Land

Laval Borque

Royal Borque

Falcon Realty, Inc.

Gilbert A. Fornatora

Francis Kirschner

Lane Development Corporation (a dissolved Florida corporation)

Ida Morin

Raymond Naud

North Star Realites, Inc., a Florida corporation

Frank Plattner

John Plattner

Domenick Simone

United States of America

CORPORATE DISCLOSURE STATEMENT

There is no corporate entity that is party to this Petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

A. Introduction 2

B. Factual & Procedural History 4

C. Eleventh Circuit Opinion 7

REASONS FOR GRANTING THE WRIT 8

I. THE FEDERAL COURTS ARE DIVIDED OVER THE CONTROLLING TEST IN SCOPE OF THE PROJECT CASES 8

A. Like the Eleventh Circuit, Three Circuits Apply a Sole Motive or Primary Purpose Standard in Scope of the Project Cases 9

1. Second Circuit 9

2. Third Circuit 10

3. Fifth Circuit 12

TABLE OF CONTENTS—Continued

Page

B. District Courts in the First and Fourth Circuits Have Applied a "Nexus" or "Inducement" Standard 13

1. *United States v. 222.0 Acres of Land* 13

2. *United States v. Certain Lands in Truro* 15

II. THERE IS NO UNIFORM STANDARD GOVERNING DUE PROCESS CLAIMS IN LARGE-SCALE FEDERAL EMINENT DOMAIN ACTIONS 16

A. Second Circuit 17

B. Fourth Circuit 17

C. Eighth Circuit 18

D. Eleventh Circuit 19

1. *Gwathmey v. United States* 19

2. *United States v. 320.0 Acres* 21

3. *United States v. 5.00 Acres* 22

CONCLUSION 23

APPENDIX

Opinion of the United States Court of Appeals, Eleventh Circuit (Feb. 11, 2009) A-1

Order of the United States District Court, Southern District (Sept. 15, 2005) B-1

TABLE OF CONTENTS—Continued

Page

Order of the United States District Court, Southern District (May 29, 2007) B-14

Order of the United States Court of Appeals, Eleventh Circuit (May 27, 2009) C-1

Fed. R. Civ. P. 71.1 . . . . . D-1

TABLE OF AUTHORITIES

Page

Cases

Boddie v. Connecticut, 401 U.S. 371 (1971) 23

Gwathmey v. United States,
215 F.2d 148 (5th Cir. 1954) 19-21

Phillips v. United States,
148 F.2d 714 (2d Cir. 1945) 17, 19

United States v. 222.0 Acres,
324 F. Supp. 1170 (D. Md. 1971) 13-15

United States v. 27.93 Acres,
924 F.2d 506 (3d Cir. 1991) 10-11

United States v. 320.0 Acres,
605 F.2d 762 (5th Cir. 1979) 21-22

United States v. 480.00 Acres,
557 F.3d 1297 (11th Cir. 2009) . . . . . *passim*

United States v. 5.00 Acres,
673 F.2d 1244 (11th Cir. 1982) 22-23

United States v. 75.13 Acres,
693 F.2d 813 (8th Cir. 1982) 18-19

United States v. Certain Lands in Truro,
476 F. Supp. 1031 (D. Mass. 1979) 3, 15-16

United States v. Land,
213 F.3d 830 (5th Cir. 2000) 12

United States v. Meadow Brook Club,
259 F.2d 41 (2d Cir. 1958) 9-13

United States v. Reynolds,
397 U.S. 14 (1970) 9

TABLE OF AUTHORITIES—Continued

Page

United States v. Va. Elec. & Power Co.,
365 U.S. 624 (1961) 3, 9, 14

United States v. Werner,
916 F.2d 175 (4th Cir. 1990) 17-18

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2072 2

Constitution

U.S. Const., amend. V 2

Rule

Fed. R. Civ. P. 71.1 . . . . . 1-2, 4-5

PETITION FOR WRIT OF CERTIORARI

Gilbert A. Fornatora, as owner of the 480.00 Acres of Land that are the subject of this case, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 557 F.3d 1297 (11th Cir. 2009), and is included as Appendix (App.) A. The land commission findings on just compensation, issued pursuant to Fed. R. Civ. P. 71.1, and the district court order adopting these findings, are unreported, but are included together as App. B.[1] The order of the Court of Appeals denying Petitioners' motion for rehearing and rehearing en banc, included as App. C, is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 11, 2009. On May 27, 2009, the Court of Appeals issued an order denying Petitioners' motion for rehearing and rehearing en banc. On August 11, 2009, this Court issued an order granting Petitioners' motion to extend the time for filing this Petition until October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] Internal Revenue Service Form W-9 (attached to the district court order adopting the land commission findings) could not be reproduced and is available at: http://www.irs.gov/pub/irs-pdf/fw9.pdf?portlet=3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V.

Federal Rule of Civil Procedure 71.1, enacted pursuant to 28 U.S.C. § 2072, establishes procedures governing certain federal government takings of private property. Fed. R. Civ. P. 71.1. Its text is reproduced as App. D.

STATEMENT OF THE CASE

A. Introduction

This case arises from the federal government's condemnation of Petitioner Gilbert Fornatora's property. Years before the formal condemnation, in anticipation of taking the property as part of a large-scale project to expand a national park, the federal government successfully pressured local authorities to increase regulation of Fornatora's land. The regulations depressed the value of the property, significantly reducing the amount of the government's eventual payment of just compensation for the taking. When Fornatora's case came before the federal land commission charged with determining just compensation, the government manipulated the

process to deny Fornatora a meaningful hearing as to the true value of his property.

This Petition raises the issue of the proper standard to govern the payment of just compensation in federal condemnation cases like Fornatora's, where the United States uses its considerable influence to push local authorities to increase regulation of property, and depress potential payments of just compensation, in advance of the federal taking of the land. Under this Court's "scope of the project" rule, increases or decreases in the property's value that result from the project itself may not be considered in determining just compensation. *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 636 (1961).

There is a split among the federal courts as to the standard courts should use to evaluate whether a property owner can avail himself of the scope of the project rule. In district courts in the First and Fourth Circuits, owners must show only that there is a nexus between a property regulation and a condemnation action, or that the federal government "induced" local authorities to enact the regulation. In these courts, application of the scope of the project rule is not contingent on a showing of bad faith motive on behalf of the government. Rather, it is the impact on private property of the federal efforts to prevent development of property targeted for acquisition, regardless of motive, that is the focus of scope of the project analysis. *See United States v. Certain Lands in Truro*, 476 F. Supp. 1031, 1034-36 (D. Mass. 1979).

In four other circuits, including the Eleventh Circuit in this case, owners are not afforded the protection of the scope of the project rule unless they affirmatively prove the federal government's sole

motive or primary purpose in influencing the regulation was the suppression of property values in order to ultimately pay less compensation for targeted land. *United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1308-11 (11th Cir. 2009) (*Fornatora*). This split between federal courts presents a significant disparity in the level of constitutional protection afforded property owners, and this Court should grant this Petition in order to address this conflict.

Moreover, this Court should grant the Petition to resolve the question of what constitutes a meaningful hearing, sufficient to protect a property owner's right to due process under the Fifth Amendment, in the context of the federal condemnation process established by Fed. R. Civ. P. 71.1. Because there are no clearly defined rules, the federal courts are issuing ad hoc determinations that vary even among decisions in the same circuit. *Fornatora*, 557 F.3d at 1314.

B. Factual & Procedural History

Fornatora acquired tracts of property in Dade County, Florida, in the 1950s and 1960s. *Id.* at 1299. In 1975, Dade County enacted a comprehensive plan that zoned this property at a density of one dwelling per five acres. *Id.* at 1300. Later that decade, the federal government became interested in restricting development in the area encompassing this property, in order to keep land vacant and available for acquisition to expand the adjacent Everglades National Park. *Id.*

This federal concern led the Department of the Interior to suggest that Dade County revisit its comprehensive plan; the federal government funded a study to facilitate this effort. *Id.* The scientific studies

commissioned for this study ultimately concluded that the existing density zoning adequately addressed the county's concerns about water quality, water supply, and flood control. *Id.* Despite these findings, the federally funded committee responsible for advising the county planners recommended that zoning be restricted to one dwelling per forty acres. *Id.* Dade County enacted this recommendation in 1981. *Id.*

In 1989, Congress authorized an expansion of Everglades National Park that included Fornatora's property. *Id.* Formal condemnation proceedings, however, did not begin until the late 1990s. *Id.* Once commenced, the federal district court for the Southern District of Florida appointed a land commission, pursuant to Fed. R. Civ. P. 71.1, to determine the just compensation due to Fornatora and the owners of the 2,700 other properties the government sought to condemn. *Id.*

The land commission process ensued for several years. On numerous occasions Fornatora objected to the district court's instructions to the land commission. One such objection involved an instruction on the scope of the project rule, where the court declined to advise the commission that project-influenced decreases in property values should be disregarded in determining just compensation. *Id.* at 1301-02. The district court overruled these objections, holding that unless Fornatora could prove that the government's "primary purpose" in influencing the county's 1981 zoning change was to depress property values in contemplation of taking the property, the scope of the project rule did not apply. *Id.* at 1301.

Responding to this ruling, Fornatora presented to the court several letters from federal agencies to Dade

County officials urging county planners to restrict development, in a "Federal-State effort" to preempt "numerous and piecemeal legal confrontations" with property owners. *Id.* at 1303. Despite this and similar evidence illustrating federal pressure related to future park expansion, the district court found no "primary purpose" to depress values, and thus held that the scope of the project rule did not apply to Fornatora's property. *Id.*

Throughout this dispute over instructions, land commission proceedings were ongoing. Cognizant of court interpretations that Rule 71 commissions must aim for uniformity in compensation amounts across large projects, Fornatora requested a prompt trial before the commission. *Id.* at 1304-05. Fornatora's stated concern was that if owners unrepresented by counsel and unaided by expert testimony had their property valued in repeated *pro se* cases early in the commission process, the resulting low amounts would be cited as precedent by the commission in later proceedings against represented parties like Fornatora. *Id.* at 1305-06.

On repeated occasions, Fornatora asserted to the district court that this manipulation was, in fact, taking place. Fornatora objected that the federal government had serially dismissed parcels from commission hearings upon any notice of appearance by owner's counsel, only to re-institute these cases after an artificially low valuation pattern had been established in hearings involving unrepresented parties. *Id.* at 1313. Through a series of government delays, incurred over Fornatora's objection and exacerbated by a reassignment of the case from one magistrate to another, Fornatora's trial did not begin

until nearly four years after the originally scheduled trial date. *Id.* at 1306. When the land commission finally issued its recommendations, it used as its benchmark valuations derived from earlier cases involving unrepresented parties scheduled early in the process by the government, and disregarded new evidence relevant to valuation. *Id.* at 1306, 1315.

Before the district court adopted the commission's recommendations, Fornatora objected to the final report based on the scope of the project instruction as well as the alleged bias incurred as a result of the government's purposeful manipulation of the commission schedule. *Id.* at 1306. The district court rejected these arguments and adopted the commission's report. *Id.* Fornatora appealed to the Court of Appeals for the Eleventh Circuit.

C. Eleventh Circuit Opinion

In a case of first impression in the Eleventh Circuit, Fornatora argued that the district court's application of the primary purpose standard was improper based on similar factual settings, in other federal cases involving the scope of the project rule, that resulted in a broader "nexus" or "inducement" standard. *Id.* at 1307; *see* Part I *infra*.

The court cited as "valid" Fornatora's criticisms of the primary purpose rule, conceding that it gives governments the incentive to mask their true motives in enacting zoning restrictions behind "pretextual assertions of benign purpose." *Id.* at 1311. So too did the court recognize as valid Fornatora's argument that

> [i]t is very unlikely that the Government would ever admit that its primary purpose or motive in passing an ordinance or regulation

> was to depress value in anticipation of condemnation. . . . [T]he Government will be able to benefit by depressing land values as long as they also have *any* other purpose for zoning regulations . . . .

Id. Despite this recognition, the appeals court rejected Fornatora's argument and instead upheld the primary purpose standard employed by the district court. *Id.* at 1310-11.

So too did the Eleventh Circuit reject Fornatora's claim that government manipulation of the land commission process prevented Fornatora from receiving a meaningful hearing on his property value, thus violating his right to due process under the Fifth Amendment. *Id.* at 1313-14. Noting varying standards from analogous fact settings in other jurisdictions, the court found that the proceedings were sufficient to "facilitate justice" and did not deny Fornatora his constitutional rights. *Id.*

Fornatora's motion for rehearing and rehearing en banc to the Eleventh Circuit was denied. *See* App. C. Fornatora timely asks this Court to review the decision below.

REASONS FOR GRANTING THE WRIT

I

THE FEDERAL COURTS ARE DIVIDED OVER THE CONTROLLING TEST IN SCOPE OF THE PROJECT CASES

In *Virginia Electric*, this Court summarized the rationale behind the scope of the project rule: " 'It

would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . (of the construction of a government project) and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned." 365 U.S. 624, 636 (parenthetical and internal quotation in original) (citation omitted). While *Virginia Electric* and similar cases, *see United States v. Reynolds*, 397 U.S. 14, 15-18 (1970), succinctly establish the general purview of the rule, its application becomes more opaque in the federal circuits. A majority of scope of the project cases involve situations where the condemnation itself is the only relevant government action. *Reynolds*, 397 U.S. at 16-17. But in settings where the relationship between two government actions—for example, a property regulation and a distinct condemnation action—is at issue, the federal courts are divided over the rule's application.

A. Like the Eleventh Circuit, Three Circuits Apply a Sole Motive or Primary Purpose Standard in Scope of the Project Cases

1. Second Circuit

The Second Circuit addressed this issue in *United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958). In *Meadow Brook*, the owner of land adjacent to an Air Force base sought to have his residential property rezoned as industrial. *Id.* at 43. The federal government, as owner of the base, opposed the rezoning before local authorities, even though the surrounding property also was industrially zoned. *Id.* at 44. Local authorities delayed a decision on the rezoning to consider the government's objections;

during this delay, and before a decision was reached, the federal government filed suit to condemn the property in order to expand the base. *Id.*

In federal court, the property owners argued that just compensation should account for the property's imminent rezoning to industrial—a more profitable classification—if not for the intervention of the federal government. *Id.* at 45. The court rejected this argument, holding that the owner failed to demonstrate that the government's "sole motive" in opposing the rezoning was to depress property values in advance of condemnation. *Id.* at 45. This test rejects application of the scope of the project rule even where the government has mingled actions designed to depress values with those typical of private, adjacent owners merely opposing a rezoning, since the "sole motive" standard requires the absence of any coincident government rationales for its actions. *Id.*

2. Third Circuit

The Third Circuit adopted the *Meadow Brook* approach, though not its precise rule, in *United States v. 27.93 Acres*, 924 F.2d 506, 511 (3d Cir. 1991). In that case, the federal government sought unsuccessfully to purchase private agricultural property on several occasions between 1985 and 1987. *Id.* at 508. In June of 1987 the government filed a complaint initiating condemnation proceedings for the property, though settlement negotiations continued between the government and the owners until December of 1988. *Id.* at 508-09.

As the condemnation and settlement negotiations advanced, the local government began plans for an "enterprise district" comprising all property within a

certain boundary, including the property targeted for condemnation, to be rezoned as commercial. *Id.* As part of this project, local authorities tentatively approved the owners' formal application for rezoning. *Id.* at 509. Soon thereafter, however, the local government reversed course and rejected the rezoning application, though the enterprise district plans moved forward. *Id.* Among the reasons given by local planners for the rejection was that the federal government had sent a letter opposing the application. *Id.*

In district court, the owners sought to have the court consider their property as commercial land in calculating just compensation. They argued this was proper in that the rezoning would have been finalized if not for the federal government's opposition, which they claimed was designed to reduce the payment of just compensation in the pending condemnation action. *Id.* at 510-11. The court rejected this contention, citing *Meadow Brook* in holding that the government's actions were "minimal and appropriate." *Id.* at 511. The court concluded that unless the owners could prove that the government's opposition was the "but for" cause of the rezoning denial, the scope of the project rule did not apply. *Id.* at 514.

This test contemplates a narrower application of the scope of the project rule than the standard promulgated by the Second Circuit in *Meadow Brook*. While proof of "sole motive" to depress value would avail owners of the scope of the project protections in the latter venue, under the Third Circuit's test even this would not be enough if some other factor could be pointed to as the proximate cause of the local government's actions.

3. Fifth Circuit

The Fifth Circuit has adopted a rule related to those of the Second and Third Circuits. In *United States v. Land*, property owners applied to the Army Corps of Engineers in 1975 for a development permit. 213 F.3d 830, 832 (5th Cir. 2000). Three years earlier, Congress had authorized a study of the feasibility of creating a national park in the same Louisiana region as this private land. *Id.* at 831. Soon after the creation of the national park in 1979, the Corps finally denied the permit application, citing, among other reasons, potentially harmful effects development might have on the new park. *Id.* at 832.

After years of litigation surrounding the denial of the permit and state environmental disputes, the federal government initiated proceedings to condemn the property. *Id.* at 833. On the question of valuation, the owners argued that just compensation should be based on the value of the property had the development permit been granted. *Id.* The owners alleged no bad faith motive, on the government's part, in the denial of the development permit. *Id.* at 836. Rather, they argued only that the government should be liable for the eventual effect of the denial on their property values. The district court agreed with the owners under the scope of the project rule, and the government appealed. *Id.* at 835-36.

On appeal, the Fifth Circuit reversed the lower court. It held that because there was no allegation that the government's "primary purpose" in denying the permit was to depress property values in advance of condemnation, the scope of the project rule did not apply. *Id.* While the Fifth Circuit cited *Meadow Brook* in applying this "primary purpose" standard, its test,

in actuality, allows for a broader application of the scope of the project rule than does *Meadow Brook*'s "sole motive" test (or the Third Circuit's "but for" reasoning, which is more restrictive than both the Second and Fifth Circuit tests). These three circuit cases and the Eleventh Circuit's decision in the present case together demonstrate a split with courts applying a "nexus" or "inducement" standard to invoke the scope of the project rule, *see below*. Yet so too do they illustrate a "split within a split" resulting from four related, yet plainly distinct, standards.

B. District Courts in the First and Fourth Circuits Have Applied a "Nexus" or "Inducement" Standard

Federal district courts for the Districts of Maryland and Massachusetts also have addressed this particular scope of the project issue. In both of these cases, courts were confronted with situations where, as in the present case, the federal government was alleged to have taken proactive steps to *increase* the regulation of property, and not merely influence local authorities to maintain the status quo by opposing zoning changes or permit applications, as in the cases cited above. That both of these courts found it appropriate to apply the scope of the project rule in such settings led Petitioners to note this factual distinction to the Eleventh Circuit in the present case, without avail. *Fornatora*, 557 F.3d at 1309-11.

1. *United States v. 222.0 Acres of Land*

In *United States v. 222.0 Acres of Land* the Secretary of the Interior sought to condemn property on the Maryland shore. 324 F. Supp. 1170, 1175 (D.

Md. 1971). The federal government, in anticipation of the taking, pressured the State of Maryland to prevent development of the property, in part to further the valid purposes of protecting the public's safety and welfare. The Interior Secretary, however, writing to Maryland's governor, also asserted that development of the property prior to the federal condemnation "would result in a monetary windfall to present property owners." *Id.* He wrote further that "such action would be looked upon with disfavor by the Congress and by the general public," and that prohibiting development would "avoid unnecessary inflation and speculation in land values" ahead of the government's eminent domain action. *Id.* Bowing to this pressure, the State of Maryland in turn pressured local authorities to institute a moratorium on any building permits, along with other development restrictions. *Id.* at 1175-76.

After the federal government condemned the property, the question of just compensation came before the court. In considering the amount to be paid to the property owners, the court dismissed government claims that the pressuring of Maryland officials was merely "incident to ownership," and rejected government assertions that the depression in value should be ignored because the induced restrictions also benefitted the public's safety and welfare. *Id.* at 1180.

Tracking this Court's language in *Virginia Electric*, the court held that "[i]t would be unfair to permit the condemning agency to depress property values, directly or indirectly, by interfering with the property owners' rights to use their land, and then take advantage of such depression to reduce the price which

it must pay for the property." *Id.* The court thus concluded that the actions of the federal government made the scope of the project rule available to the property owners, even though the devaluing regulations were merely "induced" by the Secretary of the Interior. *Id.* This proof of inducement was enough; no showing of primary purpose or sole motive was required.

2. *United States v. Certain Lands in Truro*

In *United States v. Certain Lands in Truro*, the federal government sought to establish a national seashore area on Cape Cod. 476 F. Supp. at 1032. Soon after the congressional act establishing the national seashore, and anticipating that the government would need to take private property via eminent domain to complete the project, the Department of the Interior suggested to local Cape Cod officials that certain land use restrictions be instituted. *Id.* at 1034. The federal government asserted that these restrictions, which essentially prohibited all development, were in the public interest of scenic preservation. *Id.*

The property owner alleged, however, that another purpose for the regulations was the depression of land values in anticipation of the eminent domain project. *Id.* at 1035. In determining just compensation, the district court for the District of Massachusetts conceded that the zoning regulations were by themselves valid exercises of the government's police power. However, the court also found that because the zoning changes were "motivated" and "induced" by the federal government, the scope of the project rule applied, and depression in land values

owing to the regulation could not be considered in ascertaining just compensation. *Id.* at 1035-36. Invoking the language of the Fifth Amendment to emphasize the need for fairness in takings cases, the court held that a failure to account for the realities of the federal government's coercion "would be to shut ones [sic] eyes and ears to what really went on." *Id.* at 1035. The court summarized its analysis by holding that "the federal government cannot disavow the nexus which exists between its actions and the adoption of the Truro zoning provision." *Id.* at 1035.

Neither the *222 Acres* opinion nor the *Truro* decision has ever been cabined, let alone repudiated, by the appellate courts in their respective circuits. The result is a definitive split between courts in these circuits and those of the Second, Third, Fifth, and Eleventh Circuits as to the standard to apply in these scope of the project cases. Moreover, the courts in the latter circuits, as noted above, themselves lack agreement as to the proper test that governs these cases. This Court should grant this Petition to resolve these divisions.

II

THERE IS NO UNIFORM STANDARD GOVERNING DUE PROCESS CLAIMS IN LARGE-SCALE FEDERAL EMINENT DOMAIN ACTIONS

There have been several federal court opinions addressing property owners' claims that their due process rights were violated by the government's actions in large-scale eminent domain actions, including those controlled by the Rule 71.1 land commission process. Viewed in concert, there appears

to be no actual governing standard that spans these cases. Instead, the decisions are a patchwork of ad hoc evaluations that demonstrate conflict between the circuits, and even within some federal circuits themselves, over what constitutes due process in land commission cases.

A. Second Circuit

A decade before the enactment of Rule 71.1, the Second Circuit addressed the question of due process in the context of land commissions. In *Phillips v. United States*, the federal government condemned private property for land on which to build an airplane manufacturing plant. 148 F.2d 714, 715 (2d Cir. 1945). The district court designated a land commission to determine just compensation for the property. *Id.*

When the owners were dissatisfied with the amount of compensation, and the process used to determine it, they appealed to the Second Circuit. Among their allegations was that they were denied the right to examine an appraisal used by a government expert to testify as to market values. *Id.* at 717. The owners claimed that this failure violated their right to due process. *Id.* at 716. The Second Circuit rejected the due process claim, writing that the commission possessed "no magic formula for the determination of real estate values," and that the courts may "only check the general processes on which the result rests, to see that they do not indicate such arbitrariness or capriciousness as would make the trial and its result a violation of due process." *Id.*

B. Fourth Circuit

In *United States v. Werner*, the Fourth Circuit considered a property owner's motion to disqualify a

land commissioner on the grounds he was predisposed toward issuing government-friendly rulings. 916 F.2d 175 (4th Cir. 1990). In holding that disqualification was necessary to protect the owner's due process right to a full and fair hearing, the court wrote that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 178 (citation omitted). There is nothing in the opinion to specify whether the *Werner* court was promulgating a "probability of unfairness" rule to apply to all land commission cases, or if this test was uniquely designed for the disqualification context.

C. Eighth Circuit

In *United States v. 75.13 Acres*, the federal government condemned tracts of private property for construction of a flood control project. 693 F.2d 813, 815 (8th Cir. 1982). The district court empaneled a land commission pursuant to Rule 71.1. *Id.* Two landowners appealed the resulting just compensation awards to the Eighth Circuit, objecting to the court's instructions to the commission, and that the testimony of government appraisers and the commissioners' emphasis on uniformity, as evidenced by the same three commissioners hearing all related cases, had violated the owners' due process rights. *Id.* at 816-17.

Though the court held that land commissions must "consider cases on the basis of their individual facts," the Eighth Circuit rejected all of the owners' arguments. *Id.* It held that the very purpose of the land commission process was to achieve uniformity, so the seating of the same individuals to hear evidence on

all of the properties was appropriate. *Id.* The court neither cited nor applied any identifiable due process tests in its analysis, instead concluding that the process and results comported with Rule 71.1's language and purpose. *Id.*

D. Eleventh Circuit

In the decision below, the Eleventh Circuit found that Fornatora's evidence of government manipulation of the commission process was not sufficient to sustain his due process claim. The court reached this decision not by applying any particular due process test, such as the arbitrary and capricious standard cited by the Second Circuit in *Phillips*, but instead by undertaking a holistic analysis of the commission's findings to support its conclusion. *Fornatora*, 557 F.3d at 1313-1316. This approach to the due process question conflicts not only with the holdings of other federal circuits, but also with other Eleventh Circuit decisions.

1. *Gwathmey v. United States*

In *Gwathmey v. United States*, the predecessor to the Eleventh Circuit examined due process claims in the context of large-scale eminent domain actions. The Fifth Circuit reviewed a district court case involving the question of just compensation owed to owners of more than 200 tracts of land in Florida. *Gwathmey*, 215 F.2d 148, 151 (5th Cir. 1954).

Though the proceedings in *Gwathmey* were initiated prior to the enactment of Rule 71.1, the valuation mechanism was similar to that of the present case.[2] The court's due process analysis focused on the

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[2] Rule 71.1 was enacted after the condemnations began, but prior (continued...)

manner in which the valuation trial proceeded, beginning with the principle that "[t]o insure impartial judgment the trial should be conducted in a manner that will enable the jury to understand and comprehend those facts . . . as to the approximate worth fairly determined of each owner's tract or tracts, including all elements which reasonably contribute to its current market value." *Id.* at 153.

The court in *Gwathmey* was most concerned about the failure of the lower court to permit the property owners to present relevant evidence of value, or even to cross-examine government witnesses testifying as to value. *Id.* at 154. "Government witnesses repeatedly testified as to comparable sales, physical conditions and other value factors" without any allowed rebuttal, and the "result was that the Government was able repeatedly to restate and emphasize certain of its evidence." *Id.* Where cross-examination was permitted, at times it was "allowed so long after direct examination that it was totally ineffective." *Id.*

The *Gwathmey* court acknowledged that the principles that would underlie the land commission process–efficiency and uniformity of result–were valid considerations. But in ultimately finding the trial violated the owners' right to due process, the court declined to subsume due process rights in service of these aims. The court held that while "the law permits including in a single expropriation proceeding several separate properties and owners . . . this does not

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[2] (...continued)
to the issuing of the *Gwathmey* opinion. Likely accounting for the new rule, the court explicitly applies its holding to "other agenc[ies] charged with the determination of values" in federal eminent domain cases. 215 F.2d at 153.

warrant any diminution in the duty to afford each of such individuals fair and reasonable opportunity" to present "all material facts" relevant to the value of their properties. *Id.* at 153. The court, "look[ing] realistically at all what took place here," *id.*, held that the process denied the owners "the same full and fair treatment which would be given a single owner," *id.* at 157, and that this failure "prevented the landowners from obtaining a fair determination of values," *id.*

2. *United States v. 320.0 Acres*

In *United States v. 320.0 Acres*, the Fifth Circuit addressed due process concerns stemming from the condemnation of property taken, like Fornatora's, for Everglades National Park. 605 F.2d 762 (5th Cir. 1979). The court began its inquiry by noting that despite the efficiency benefits of large-scale eminent domain hearings, the ultimate concern must still be the protection of owners' constitutional rights. *Id.* at 770.

The court expressed its displeasure with the valuation proceeding by referring to it as a "trial" in quotation marks. *Id.* at 770. The court noted that in many cases, "the owner had neither retained counsel nor requested a jury trial," resulting in a process that "consisted of a Government appraiser taking the stand and reading his estimate of fair market value for a number of tracts, followed by the entry of judgment in the amount of the appraised sum for each tract on the list." *Id.* As in the present case, the court was confronted with a spate of such hearings for unrepresented owners at the outset of proceedings, only then followed by hearings involving owners aided by counsel and expert witnesses. *Id.*

As a result, the appeals court concluded that both the lower court and the federal government –the latter of which "did not shoulder [its] responsibility for facilitating justice in these unusual circumstances, but instead assumed the distinctly adversarial role more appropriate to the conventional one-on-one litigation"—had behaved such that "the landowners before us on appeal were not afforded the due process guaranteed them by the Fifth Amendment." *Id.* As in this present case, the court articulated no particular due process standard beyond its focus on the facilitation of justice.

3. *United States v. 5.00 Acres*

In *United States v. 5.00 Acres*, the Eleventh Circuit wrote of its paramount concern for protecting the due process rights of property owners: "Because the protection of a jury is not afforded, the courts must be particularly vigilant to ensure that every precaution is taken to safeguard the rights of individual landowners." 673 F.2d 1244, 1247 (11th Cir. 1982). While Rule 71.1 was designed to promote efficiency and "achieve some uniformity of result" in cases involving "large areas [of land] held by many small landowners," *id.*, the *5.00 Acres* court nevertheless demanded vigilance and "every" precautionary safeguard for individual landowners.

After articulating this concern, the *5.00 Acres* court held that the evidence of bias presented by the owners in that case was insufficient, describing the owners' reliance on the volume of *pro se* trials as a mere "recitation of numbers." *Id.* at n.2 . Under these circumstances, the appeals court held that the lower court did not fail to afford individual owners the

"particular vigilan[ce]" required in land commission cases. *Id.*

In *Boddie v. Connecticut*, this Court held that "at a minimum . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U.S. 371, 377 (1971). This Court should grant the Petition to resolve the federal circuit split, outlined above, over what this prescription tangibly means for the constitutional rights of owners of property subject to the land commission process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: October, 2009.

Respectfully submitted,

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Appendix A–1

United States Court of Appeals,

Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

480.00 ACRES OF LAND, More or Less, in the County of Dade, State of Florida, et al., Defendants,

Gilbert R. Fornatora, Frank Plattner, et al., Defendants-Appellants.

No. 07-13584.

Feb. 11, 2009.

Before BIRCH and MARCUS, Circuit Judges, and FORRESTER,* District Judge.

FORRESTER, District Judge:

Appellants appeal the district court's order confirming and approving a September 15, 2005 Land Commission Report setting the compensation that the United States must pay Appellants to take their property by eminent domain. Appellants contend that (1) the district court adopted the wrong legal standard to determine whether the Government improperly used a local zoning ordinance to prevent development on and reduce the value of their land; (2) the district court improperly excluded evidence of the Government's efforts to depress their land values from being presented to the Land Commission; and (3) the procedures employed by the Land Commission and the

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* Honorable J. Owen Forrester, Senior United States District Judge for the Northern District of Georgia, sitting by designation.

United States in determining their "just compensation" denied them due process of law.

For the reasons set forth below, we AFFIRM the district court's order awarding compensation and hold that (1) in order for a fact finding body to ignore a regulation in calculating "just compensation" for a given piece of property, the landowner must show that the primary purpose of the regulation was to depress the property value of land or that the ordinance was enacted with the specific intent of depressing property value for the purpose of later condemnation; (2) once the district court determines that a regulation or ordinance was not improperly used to prevent development and reduce value, there is no reason to present evidence of such allegations of improper use to a Commission charged with determining "just compensation"; and (3) no actual bias was present in the Commission report filed on September 15, 2005, and the individual landowners' rights were preserved.

I. Background

The instant appeal involves seven regulated, vacant, and unimproved tracts of wetlands in Dade County, Florida suitable for passive recreational use. The Appellants acquired the tracts in the 1950s and 1960s.

A. The History of Regulation on These Properties

In 1971 South Florida experienced a water crisis, and the citizens of Dade County ("the County") became increasingly concerned about development in the Everglades and its impact upon the County's demand for water. Therefore, in 1975 the County designated a large area of land, including Appellants' acreage, as an "Area of Critical Environmental Concern" and

developed a Comprehensive Development Master Plan which restricted development to one dwelling per five acres. During this time, the National Park Service also became concerned about development in the area east of the Everglades National Park. This property contained watershed area that the Park Service believed, from an ecological perspective, should have been included in the original park boundaries.

The Park Service suggested that the County revisit its Comprehensive Development Master Plan for the area. A federally initiated and funded study process known as the East Everglades Resource Planning Project (EERP) began. EERP sought to recommend a management plan to Dade County. Dade County sought to use the EERP to address its local water supply and control concerns. Although the EERP studies concluded that the existing one-dwelling-per-five-acre density under the 1975 Plan adequately addressed the County's water concerns, the EERP recommended one dwelling per forty acres with no agriculture allowed. The County adopted the more stringent one-per-forty standard when it passed the 1981 East Everglades Zoning Overlay, later added to Chapter 33B of the County Code.

B. Condemnation

In 1989, Congress authorized the expansion of the boundaries of Everglades National Park to include most of the area known as the East Everglades and the Appellants' acreage. 16 U.S.C. §§ 410r-5, *et seq.* Congress did not provide any funding for the private land acquisition necessary for expansion until 1992, and the expansion was not fully funded until 1999. Armed with sufficient funding, the U.S. Department of the Interior filed 2,700 condemnation cases in the U.S.

District Court for the Southern District of Florida beginning in 2000. Given the large amount of land and the large number of land owners involved, the district court appointed a land commission ("the Commission") pursuant to Fed. R. Civ. P. 71.1(h) to determine the just compensation due to each landowner as part of the East Everglades Acquisition Project.

The district court issued instructions to the commissioners, and the parties were given the opportunity to object. (R-5). These instructions outlined the relevant rules of law and procedure necessary for the Commission to make a determination of fair compensation as a fact finding body similar to a jury.

Instructions 5, 16, 19, and 21 are particularly relevant to this case. The last portion of Instruction 5 states, "It is proper to look to state law to determine the existence of land use or other restrictions on the uses to which the property may be devoted, because any such restrictions on the lawful uses of the property limit the uses available for consideration as highest and best use." (*Id.* ¶ 5). Instruction 16 addressing "Highest and Best Use," states in part:

> Any proposed highest and best use must be a legally permissible use. Where the use of the property is restricted by the requirement of a permit or license or by any other land use restriction it must be shown that there is a reasonable probability that such permit or license will be issued or that a re-zoning will occur to make the use legal.

(*Id.* ¶ 16). Paragraph 19 is entitled, "Reasonable Probability," and it reiterates that legal restrictions on the use of the property must be considered in determining its highest and best use. "If, at the time of the taking, the property was subject to zoning restrictions, license regulations, or other land use restrictions those factors must be considered in evaluating the property. . . ." (*Id.* ¶ 19). Paragraph 21 entitled, "Value to the Government" states:

> You are not to consider the value of the property to the Government, nor may you consider when valuing the property before the taking, any increase or increment of value by virtue of the activities of the Government with reference to the project for which the property is being acquired.

(*Id.* ¶ 21).

In the fall of 2000, several landowners filed objections to the district court's instructions. (R-6). Appellants objected generally to the Commission being allowed to consider current zoning restrictions on the use of their properties resulting from the Counties' 1981 East Everglades Zoning Overlay. Appellants contended that the United States Department of Interior improperly influenced the County to pass the Overlay in order to make its subsequent condemnation of the East Everglades easier and less costly. Specifically, Appellants objected to Instructions 19 and 21.[1]

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[1] Appellants also objected to Instructions 5, 15, 16, 22, and 26, but these objections need not be addressed in this appeal.

In its Order addressing the objections, the district court agreed with Appellants that "the government 'may not misuse its zoning powers to reduce the expense of a subsequent condemnation.'" (R-6, at 9). The district court considered two issues: "(1) What is the necessary proof that the purpose of the restriction was a 'tool' to depress the value of the land? and (2) Whether the rule applies when the governmental body that imposed the restriction differs from the one that condemns the property?" As to question one, she found that some courts require that the "sole purpose" of the regulation be to depress property values; *see United States v. Meadow Brook Club*, 259 F.2d 41, 45 (2d Cir. 1958); other courts require that the "primary purpose" or "real purpose" be to depress property values to minimize the cost of acquisition; *see Dep't Public Works and Buildings v. Exchange National Bank*, 31 Ill. App. 3d 88, 334 N.E.2d 810, 819 (1975); while a third set of courts requires only that the governmental body "intentionally" or "deliberately" manipulate zoning to depress the value of the property being condemned; see *City of Bellevue v. Kravik*, 69 Wash. App. 735, 850 P.2d 559, 562 (1993). From these cases, she articulated the following standard: "the landowner must show that the primary purpose of the regulation was to depress the property value or that the ordinance was enacted with the specific intent of depressing the property values for the purpose of condemnation." (R-6, at 11). With respect to the second inquiry, she examined the holdings in *California v. Southern Pacific Transportation Co.*, 33 Cal. App. 3d 960, 109 Cal. Rptr. 525 (1973), and *Assateague Island Condemnation Opinion No. 3*, 324 F. Supp. 1170 (D. Md. 1971), and stated:

> The Land Commissioners may disregard zoning restrictions improperly imposed by the State of Florida or Dade County only if there is evidence that the United States either directly or indirectly depressed property values. If the State of Florida or Dade County previously imposed a zoning restriction on the land at issue independently of -- i.e., "neither taken in concert nor by agreement with" -- the United States, even if such restriction was imposed explicitly and uncontrovertedly to aid the State or County to condemn the property at depressed value, the zoning restriction must be considered in accordance with the other instructions.

(*Id.*, at 15). She stated that the court was aware of no evidence in the record that would meet either the intent or primary purpose standard and held "unless and until evidence is presented that this will be an issue at trial, there is no need to modify [Instruction 19]. If this becomes an issue at trial, the court will amend the instructions." (*Id.*). She agreed to modify Instruction 21.[2]

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[2] Instruction 21 then read: "Scope of Project: You are not to consider the value of the property to the Government nor may you consider when valuing the property before the taking, any increase or decrease in value by virtue of activities of the Government with reference to the project for which the property is acquired."

C. *Two Years of Pretrial Proceedings in Magistrate Court*

Appellants' seven properties were consolidated for trial and a trial was set for December 2001. (R-7, R-8).[3] Numerous pretrial proceedings pushed the trial date back from December 2001. In September 2001, Appellants again moved to amend the instructions related to Instruction 19 and for an evidentiary hearing on his motion. (R-9). The Government opposed the motion and argued for a motion in limine ruling that the 1981 Zoning Overlay should be considered in the proceeding and barring re-litigation of the matter. The district court temporarily denied Fornatora's motion and instructed the parties to submit all evidence and to brief (1) whether the zoning regulation was enacted with the primary purpose or specifically intended to depress the value of property for later condemnation; and (2) whether the Government acted in concert or agreement with the agency that actually imposed the zoning ordinance depressing property values in anticipation of condemnation, so that the court could determine whether an evidentiary hearing was needed. (*Id.*). Magistrate Judge Moore issued an order explaining the mechanics of presenting these issues and in doing so stated:

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[3] It is important to note the numerous judicial changes throughout the course of this case. It appears that Judge Lenore Nesbitt had the case through most of its early stages, although Judge K.M. Moore signed numerous orders as well. The case was transferred to Judge William Zloch in October 2001. Judge Zloch referred the case to Magistrate Judge Andrea Simonton in November 2001. The case appears to have been taken out of Judge Simonton's hands in January 2003 and assigned to Magistrate Judge Robert Dube; he and Judge Zloch had the case until the appeal.

> Whether to provide the instruction [on the federal government's influence over county zoning ordinance] and the language of the instruction is a matter for the Court to decide; what impact that this evidence has on the amount of just compensation is a matter for the Commissioners to decide. If either party believes that there is insufficient evidence on the improper zoning issue to preclude presentation to the Commissioners, then that party should file the appropriate motion to exclude certain evidence . . . [and] have the Court render a decision as a matter of law on this issue.

(R-15, at 5). Pretrial disputes on these issues lasted for more than two years before the Magistrate Judge.

On August 4, 2004, the Magistrate Judge issued a Report and Recommendation addressing "whether the Land Commission should be instructed that the zoning restrictions (the 1981 East Everglades Zoning Overlay and related ordinances) imposed by Miami-Dade County . . . should be disregarded in determining the value of the subject parcels based on the application of the 'scope of the project' doctrine." (R-14). The court extensively reviewed information surrounding the passage of the 1981 Zoning Ordinance, going back to the early 1970s. The Government introduced a 1978 resolution adopted by the Dade County Board of Commissioners entitled, "Resolution Approving the Plan of Study for the East Everglades Land/Water Resources Management Plan; and Authorizing County Manager to Apply for and Enter into a Federal Grant and Seek State and Water Management District Funding to Assist in the Preparation of said Plan," the

1975 Comprehensive Plan designating a major portion of the East Everglades as an "Area of Critical Environmental Concern pursuant to Chapter 33B, Code of Metropolitan Dade County," the Proposed Management Plan, and the 1981 Overlay Ordinance itself. Appellants were allowed to present the following evidence which they contended supported the Government's involvement in the passing of the Overlay.

(1) A March 1974 Letter from the Asst. Secretary of the Interior to the Attorney General of Florida and the Dade County Manager which discusses concerns about future development and stated:

We are concerned about the extensive future development of the Taylor Slough area and all the drainage areas to the eastern portion of Everglades National Park, which the construction of this road portends. We assume you share our concern in this respect. However, rather than allowing such extensive future development to occur and create a danger to Park resources, which would necessitate numerous and piecemeal legal confrontations, a preferable solution to these problems is a cooperative Federal-State effort to take the initiative by asserting the legal authorities at our disposal and controlling development in these areas prior to the necessity for litigation. Such a solution would most effectively protect all the interests concerned, i.e., the Everglades, the State's downstream resources, and the affected landowners.

(2 A June 1974 letter from the Superintendent of Everglades National Park to the Dade County Mayor and Commission urging the preservation of the East Everglades through an extension of the moratorium and an adoption of proper land use

regulations and encouraging "strong, joint, County, State and Federal action."

(3) Federally funded studies in the mid-1970s and statements made by a Department of Interior official in 1976. The official talks about the possibility of taking lands in the East Everglades, the expense of doing so, and other possible solutions involving state and county governments. These federal studies recognize that Dade County might allow more intensive uses of the East Everglades than would be acceptable for Park management purposes and suggest, "the Department of the Interior must be prepared to take additional actions, up to and including purchase in order to protect [its] interest."

(4) Documents suggesting that the one-dwelling-per-forty-acres restriction was not based on the County's research but was a restriction recommended by the Government as the maximum restriction allowed to avoid a regulatory taking.

(5) Documents indicating a long history of the federal officials providing comments on projects proposed for adjacent or related lands and noting the Government's participation in the East Everglades Resources Planning Project.

(*Id.*, at 12-18).

The Magistrate Judge found:

> In the present case, the evidence presented to this Court, as extensively set out above, fails to show that the primary purpose of the Zoning Overlay Ordinance was to depress the

> property values of the subject parcels or that it was enacted with the specific intent of depressing property values for condemnation purposes. The evidence instead shows that the purpose and intent of the regulations was for the ecological reasons set out in the Ordinance itself. The evidence presented by the Defendants completely fails to satisfy the requirements imposed by [the original Judge district court order] that the movant show that reducing property value was the intent and purpose of the Ordinance. Thus, no relief on this basis is warranted.
>
> Additionally, even if the evidence could somehow be seen to allow for the determination that the purpose and intent had been shown, there is clearly insufficient evidence to show that the United States acted in concert or agreement to depress the property values. All the evidence presented to this Court shows is that the federal government shared the concerns expressed by the state and local governments in ensuring the continued vitality of the natural resources of South Florida.

(R-14, at 25). The Report and Recommendation recommended that Appellants' Instruction 19 motion be denied and the Government's motion in limine be granted and that all related motions be denied with prejudice. Appellants objected to the Report and Recommendation, but on November 8, 2004, the district court conducted a *de novo* review and adopted it. (R-15).

D. The Trial and Commission Report

The parties proceeded to trial on August 16-18, 2005, before the Rule 71 Land Commission to determine just compensation for Appellants' seven tracts. Appellants contended that the value of their six small tracts was $1,500 and the value of their large tract was $2,000 per acre, while the Government contended that the values were $500 and $850 per acre, respectively. Appellants presented two witnesses along with their own testimony. A certified appraiser testified as to the fair market value of the seven parcels, while a planner and land use expert provided testimony on permissible uses of the land of the subject properties and the properties the appraiser used as comparables. The Government presented the testimony of another certified appraiser; the owner of Alligator Farms, Inc., and the purchaser of a number of the Government appraiser's comparables; a hydrologist with the Everglades National Park; and an employee of the South Florida Water Management District. The appraisers agreed that the highest and best use for the seven tracts was passive recreational use and that the comparable sales approach was the best method to determine value. The two experts differed in their comparables.

Appellants' appraiser used sixteen comparables, ranging in value from $1,196 to $3,000 an acre. Two of the sixteen comparables were within the relevant land areas, while the other fourteen were outside the relevant land areas twenty or more miles south in areas that, while environmentally sensitive, were not as limited by zoning restrictions. Seven of the comparables involved sales to the Everglades Alligator Farm. The owner testified that he only paid the price

he paid for these parcels because they were within the vicinity of his business and necessary to secure air boat trails for his tourist attractions. Three of the comparables had the potential for agricultural use and one of his comparables had value as a mining property. Appellants' property was suitable for neither mining nor agriculture.

The Government's appraiser used seven comparables ranging in value from $200 to $2,083 an acre. Only two of his comparables were sold within the past fifteen years, and those properties were distress sales which offered little insight. One of his other comparables was a bank foreclosure. The Government appraiser's $2,083 per acre property was in a less restrictive area, had road access, and had a structure built upon it. The Government appraiser also included comparable # 6, a 1982 sale of eighty acres for $500 per acre, and comparable # 1, a 1986 sale of 137 acres for $700 per acre. Appellants offered a 1987 comparable for $1,050 on cross-examination of the Government's expert to challenge his 1986 comparable. Appellants did not offer this comparable in their case in chief because they believed it to be too old.

The Commission issued its report on September 15, 2005. (R-16). The land commission determined Appellants had not established that their properties should be valued at $1,500 and $2,000 an acre, respectively, but they had established that their value was more than the $500 and $800 an acre values the Government put forth. The Commission assessed all twenty-three comparables presented by the appraisers in their direct testimony. The Commission found that while properties discussed by Appellants' appraiser provided insight into the value of Appellants' land,

none of properties were actually comparable. The Commission found that only comparable # 1, the 1982 sale for $500 an acre, and comparable # 6, the 1986 sale for $700 an acre, offered by the Government were actually analogous to Appellants' properties. The Commission did not address the 1987 comparable. The Commission set just compensation for Appellants' six smaller properties at $700 per acre and the proper value for the seventh and largest property at $900 per acre. The total value of Appellants' acreage was $472,000. In accordance with the district court's pretrial ruling, the Commission did not hear any of the Appellants' evidence regarding the Government's involvement in the 1981 Overlay or the value of the lands without the Overlay restrictions.

E. Proceedings Following the Commission's Report

Relevant to this appeal, Appellants raised three objections to the Commission's report and claimed that these objections constituted independent grounds for the district court to conduct a *de novo* trial on the issue of just compensation or remand the report for a new trial before a newly-appointed commission. First, they contended that the district court had used the wrong standard to determine whether the Government had acted to depress land value. Second, they contended that the district court should have amended the instructions to the Commissioners relating to the 1981 East Everglades Zoning Overlay. The court found that these two objections regarding the 1981 Zoning Overlay had already been addressed and rejected in an earlier Report and Recommendation. Lastly, Appellants argued that the trial proceeding before the Land Commission violated Due Process.

According to the Appellants, the Government had been scheduling trial groups "in which either no landowners or landowner attorneys appeared or in which landowners appeared *pro se*, without assistance of counsel and without producing expert valuation testimony." Appellants argued:

> By voluntarily dismissing parcels for which an attorney filed a notice of appearance in the early trial groups, the government achieved for itself the practical equivalent of ex parte hearings. The [Government] could present its appraisers without cross-examination or without competing expert testimony. It could advise the Commission on points of law with no opposing legal argument or input from the Court.

(R-17, at 9). Appellants ultimately concluded that by the time their case went to trial, a clear pattern of compensation rulings had emerged and the Commission had their minds entirely made up. First, Appellants noted that the Commission consistently valued isolated tracts in Management Area 2A of the Everglades at $500 per acre in adherence with the Government expert's opinion, but the Commission would bump the value up to $700 for no apparent reason when a landowner appeared *pro se*. Second, the Commission did not give any weight to the 1987 comparable sale for $1,050 per acre highlighted by the Appellants during the cross-examination of the Government's appraiser, direct of Appellants' appraiser, and Appellants' closing, despite the fact that the 1987 sale was in the vicinity of the 1986 comparable on which the Commission relied and was

a year closer to the date of valuation. Appellants differentiated their case from *United States v. 5.00 Acres*, 673 F.2d 1244, 1247 (11th Cir. 1982), which rejected an argument that a Commission was biased because it had heard thirty-nine uncontested cases. Appellants instead compared their case to *Gwathmey v. United States*, 215 F.2d 148 (5th Cir. 1954) (reversed and remanded for a new trial due to owners being denied due process after Government condemned 236 tracts and presented all evidence before one jury).

The Magistrate Judge issued a Report and Recommendation recommending Appellants' objections be rejected. (R-17). The Magistrate Judge found that (1) *Gwathmey* was distinguishable and did not control the matter, and (2) "the Commission examined the comparables presented, including the [comparable referenced by Appellants] and noted in detail their reasoning for accepting and rejecting each comparable. The Commission's refusal to consider Appellant's appraiser comparables was reasonable, and the [Appellants] have failed to show any basis for rejecting the Report of the Commission on grounds of bias or depravation of due process." Appellants moved vacate the Magistrate Judge's Report and Recommendation. The district court vacated the Report and Recommendation, reviewed the matter *de novo*, rejected Appellants' arguments, and then adopted the Commission's findings on compensation. Appellants appealed to this court. (R-18).

II. Discussion

The beginning of the inquiry in any condemnation matter is the Fifth Amendment which states that "[n]o person . . . shall be deprived of . . . property without due process of law; nor shall private property be taken

for public use, without just compensation." U.S. Const. amend. V. In addition to the considerable due process jurisprudence, courts have developed a number of legal working rules to determine when compensation is "just." First, the measure of compensation is generally the value of the property at the date of taking. *United States v. 320 Acres*, 605 F.2d 762, 781 (5th Cir. 1979).[4] The value of a property is generally its "market value" or the price that a reasonable and willing buyer would pay a reasonable and willing seller given market conditions. *Id.* Just compensation is not limited to the value of the property as it is presently used but also includes any additional market value it may command because of the prospects for developing it to the "highest and best use" for which it is suitable. *Id.* In determining a property's "highest and best" use, a court may consider existing zoning restrictions; if a zoning restriction precludes a certain use, the court will generally not consider that use in its evaluation. *Id.* (quoting *United States v. Meadow Brook Club*, 259 F.2d 41, 45 (2d Cir.), *cert. denied*, 358 U.S. 921, 79 S.Ct. 290, 3 L.Ed.2d 239 (1958)). In determining what a hypothetical willing buyer would give for property, courts often look to actual, comparable sales on the open market between other willing buyers and sellers. *Id.* at 781 n.23. "Generally, the more comparable a sale is, the more probative it will be of the fair market value of the condemned property." *Id.* at 798. "Sound and just trial practice is to admit as many of the 'most comparable' sales available as is necessary to fairly

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.

permit each side to present its argument of fair market value for the jury's consideration." *Id.*

In some cases strict adherence to market value and comparable sales will result in manifest injustice to the owner or to the public, and courts must apply special rules and standards to arrive at "just" compensation. One such rule is the "scope of the project" doctrine. This doctrine seeks to ensure that when deciding the market value of the property the fact-finding body does not consider the positive or the negative impact of any decision the Government makes within the scope of the project which prompted the taking. As a part of this doctrine, a fact finder may disregard the impact of a zoning restriction on a piece of property in determining just compensation when the Government passed the restriction for the purpose of depressing the property's value in an impending eminent domain proceeding. *United States v. 320 Acres*, 605 F.2d at 820 n.131 (citing *Metropolitan Area Transit Authority v. One Parcel of Land*, 413 F. Supp. 102, 106 (D. Md. 1976), *aff'd*, 548 F.2d 1130 (4th Cir.1977)).

The instant matter requires us to address the appropriate legal standard in this circuit for determining when the Government has passed a restriction for the purpose of depressing a property's value in an impending eminent domain proceeding and when a court should give an instruction to the fact finder regarding such restrictions, as well as the appropriate process to be given land owners during a condemnation proceeding.

A. The Correct Legal Standard to Determine When a Zoning Restriction or Regulation Should Be Ignored Because the Government Acted to Depress Property Value in Anticipation of Condemnation

The Eleventh Circuit has never addressed the appropriate standard for determining whether the Government has implemented a restriction in order to depress value preceding a taking by eminent domain. We must decide whether to affirm the district court and adopt the "primary purpose" or "intent" standard supported in part by the Second, Third, and Fifth Circuits, see *United States v. Land*, 213 F.3d 830 (5th Cir.2000) ; *United States v. 27.93 Acres of Land*, 924 F.2d 506 (3d Cir.1991); *United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir.1958), adopt the broader "nexus" standard advocated by Appellants, or adopt a unique standard. This issue is a matter of law which we review *de novo*. *Southern Natural Gas v. Land, Cullman County*, 197 F.3d 1368, 1372 (11th Cir. 1999).

The district court's standard consists of two parts – (1) "a landowner must show that the primary purpose of the regulation was to depress the property value or that the ordinance was enacted with the specific intent of depressing property values for the purpose of condemnation," and (2) the landowner must show that the government body imposing the regulation is either the same government body involved in the condemnation or has acted "in concert [or] agreement with" that entity (R-6 at 11, 14). Appellants dispute the intent or primary purpose requirement.

An analysis of the primary purpose or intent standard begins with *Meadow Brook*. 259 F.2d 41. There, a landowner sought to have the Town Board re-zone its property from residential to industrial. *Id.* at 44. Despite the fact that the area surrounding the property had become largely industrial, the Air Force, as an adjoining landowner, objected to the re-zoning. *Id.* Shortly thereafter, the Government moved to condemn the landowner's property to expand the Air Force base. *Id.* at 43. The landowner contended that the Air Force had acted in bad faith in opposing re-zoning in order to lower the value of the property prior to condemnation, and absent the Air Force's intervention rezoning would have occurred. *Id.* at 45. The court rejected the landowner's argument applying a "motive test." The Second Circuit stated:

> Clearly, the United States, like any adjoining landowner, was a proper party to resist re-zoning . . . . If the air force had a proper motive, this well might have precluded re-zoning at any time [and therefore an increase in the property's value] . . . . But it is also clear that if the government's sole motive in resisting the change in zoning was to depress the market value of the property which it then intended to condemn, the court's estimate of the probability of re-zoning (as a factor entering into the ultimate calculation of value) should not have reflected this opposition.

Id. The Second Circuit found that there was not sufficient evidence in the record to support Meadow Brook's charge of bad faith and affirmed the district court's decision to consider the existing zoning of the

property and the unlikelihood that it would change in determining the property's market value. *Id.* at 46.

The Fifth Circuit recently adopted *Meadow Brook's* standard in *Land.* 213 F.3d 830. There, the Fifth Circuit decided that the Army Corps of Engineers' 1979 decision to deny a development corporation's construction permit to build a levee was not within the scope of the National Park System's ultimate acquisition and condemnation of land for Jean Lafitte National Park. *Id.* at 835-36. Congress created the park in 1978; its plans to acquire land begin in 1986; and the Government did not file condemnation complaints until 1994. *Id.* The court found that there was no evidence that the Corps' motive in denying the land developer's permit application was to drive down the value of the property, and instead the record indicated that the Corps' primary purpose was to protect the Jean Lafitte National Park's ecosystem. *Id.* at 836. As such, the court found that compensation for the levee land should be based on its value at the time of condemnation rather than the value it might have had if the Corps had granted the 1975 construction permit. *Id.*

The Third Circuit adopted *Meadow Brook* in *27.93 Acres.* 924 F.2d 506. There, the Government contacted landowners to acquire their property, zoned agricultural, for the Appalachian National Scenic Trial. *Id.* at 508-11. The parties could not reach a settlement and the Government ultimately filed a condemnation proceeding. *Id.* Prior to the condemnation proceeding, the Township in which the land was located began contemplating an enterprise district which would require that the landowner's property be re-zoned as commercial. *Id.* While in

discovery with the Government, the landowners filed an application to have their property re-zoned with the Township planning board and it was tentatively approved. *Id.* The Government agreed to postpone trial and take discovery on the commercial value of the property. Prior to the close of discovery, the Planning Commission recommended to the Township that the landowners' petition be denied, offering four reasons. *Id.* The landowners later learned that the Government had sent a letter to the Township Board stating that it opposed the re-zoning request. *Id.* The board ultimately denied their petition. *Id.* At trial, the district court did not allow the landowners to present evidence of the commercial value of the property. *Id.* The landowners appealed to the Third Circuit arguing that the district court's discovery rulings preventing them from offering evidence at trial on the Government's motives in opposing re-zoning and the commercial value of the land were improper under *Meadow Brook*. *Id.* at 511.

The Third Circuit reviewed for abuse of discretion and affirmed the trial court finding that despite the fact that the landowners had deposed the author of the letter to the Board and taken other discovery, they offered no more than conclusory allegations regarding motive. *Id.* The court found that the landowners had not shown by a preponderance of the evidence that the Government's actions were the "but for" cause of the Board's removal of the condemned tract from the enterprise district and the decision not to re-zone, and thus the district court acted appropriately in not submitting to the jury the question of whether the condemned tract would likely be re-zoned commercial. *Id.* at 814.

Appellants urge us to ignore the intent or motive holdings of our sister circuits and instead to adopt a standard under which a landowner must only show a "nexus" between the Government's project-related activities and the local zoning which caused depreciation in value. Appellants draw this standard from *United States v. Truro*, 476 F. Supp. 1031 (D. Mass. 1979), and *Assateague Island Condemnation Opinion No. 3*, 324 F. Supp. 1170 (D. Md. 1971). In *Truro*, "Congress motivated, and, as a practical matter, pressured" six towns to enact zoning provisions which Congress wanted to preserve "the Cape Cod way of life without risk of further development or of uses inconsistent" with Congress's plan to establish a national seashore there. *Id.* at 1033-34.[5] After the zoning provisions were in place, Congress condemned properties within the six towns for a national seashore. *Id.* at 1034. The owners of the zoned and condemned tracts sought to have the "zoning bylaw set aside for the limited purpose of determining the fair market value of their land and [sought] to have the fair market value of their land determined pursuant to what the zoning provision would have been in the absence of federal intervention." *Id.* at 1035. The court found that the new zoning bylaws were "in large part motivated, induced and implemented by agents of the

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[5] The Department of the Interior provided officials in the affected towns with copies of suggested minimum zoning requirements. The Secretary of the Interior drafted legislation so that all zoning ordinances passed by the towns would have to be approved by him. The town planning boards understood "that a bylaw providing for anything less than [the zoning restrictions that the Department of Interior wanted] would not be approved by the Secretary and that they must either adopt [these regulations] or live with the risk of condemnation" by the Government. *Truro*, 476 F. Supp. at 1034.

United States," the town's adoption of the zoning provisions "was an integral part of the federal design," and the "federal government should not be allowed to profit from the decreased property values which [those] bylaws effected." *Id.* The court distinguished the *Truro* situation from other instances in which there was no connection between the taking authority and the applicable zoning regulation. The court held that "the federal government [could not] disavow the nexus which existed between its actions and the adoption of the Truro zoning provision," that it was "clear both from the statutory language and the evidence presented at the hearing that Congress made an offer which *Truro* realistically could not refuse," and to "characterize the enactment of the [zoning bylaws] as the totally free act of the Truro citizenry at town meeting would be to shut one's eyes and ears to what really went on." *Id.* The court allowed the affected landowners to introduce evidence of less restrictive town zoning on similar lands outside the proposed national park boundary to establish value. *Id.* at 1036. The court found that the fluctuations in market price attributable to the zoning restrictions were attributable to the project itself, and like any depreciation or appreciation in value due to the impending project, such fluctuations should be excluded in determining value. *Id.*

Although *Truro* uses the word "nexus" and never explicitly requires proof of motive or intent, it does not appear to trumpet the broad standard which Appellants advocate. The actions of the Secretary of the Interior were so overt that they arguably evidenced intent and primary purpose. Further, it is clear that the Township was working "in concert" with the Secretary when it passed the zoning restrictions, and

the strong arm tactics of the Secretary imply that "but for" the Secretary, the Township would not have passed the restrictions it did. Thus, the facts of *Truro* actually seem to support the standard articulated by the district court.

Assateague Island also addressed a national seashore project. 324 F. Supp. 1170. There, Worcester County enacted a moratorium on building permits and restricted sewage disposal permits on Assateague Island at the urging of the Department of Interior to slow development until Congress could consider the development of a national seashore there. *Id.* at 1175-76. Both the moratorium and the sewage permit process were struck down by Maryland courts before the United States ultimately decided to develop a national seashore and sought to take land on Assateague Island by eminent domain. *Id.* at 1177. The landowners argued that the moratorium on building permits and the difficulty in obtaining sewage disposal permits decreased the value of their land. They wished to introduce evidence of land sales in other nearby communities not subject to these restrictions. *Id.* at 1171-72. The court considered sales in other areas not subject to the restrictions. The landowners were not required to show that the Department of Interior's sole motive or purpose in encouraging the restrictions was to depress land value. *Id.* at 1180-81. Further, the court considered the activities of the Government in setting compensation. *Id.*

Unlike the instant case, *Assateague Island* did not involve a zoning restriction which landowners asked a court to disregard; both of the restrictions at issue were struck down by state courts prior to the Government's

eminent domain action. The *Assateague Island* court was never faced with the question of the appropriate standard to set aside a zoning restriction; rather, it merely had to consider whether land sales under the restrictions could be used as comparables. Further, in *Assateague Island* there was direct evidence that the Government's primary purpose was to depress property values.[6] Thus, we find *Assateague Island* to be an inappropriate case from which to draw a standard.

Appellants' primary argument for a "nexus standard" is their concern that a primary purpose or intent standard gives the Government a strong incentive to mask its real purpose in passing zoning restrictions behind pretextual assertions of benign purpose. It is very unlikely that the Government would ever admit that its primary purpose or motive in passing an ordinance or regulation was to depress value in anticipation of condemnation. According to Appellants, the Government will be able to benefit by depressing land values as long as they also have *any* other purpose for zoning regulations which would only happen in rare cases. Courts will have to engage in an intense, fact based, exploration of personal correspondence and similar evidence to determine "intent" and "primary purpose" to prohibit such conduct.

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[6] "The Secretary of the Interior asked the State to defer the building of a bridge 'until Congress has had an opportunity to evaluate the legislative proposals that will soon be placed before it to create a National Seashore' because otherwise the bridge will 'result in a monetary windfall to present property owners' and delaying construction would 'avoid unnecessary inflation and speculation in land values.' " (Appellee Brief, at 18).

Appellants' concerns are valid; however, the "scope of the project" rule is a narrow exception from the general rule that regulations are to be considered in determining a project's "highest and best use." Courts have only applied exceptions to a general takings doctrine when it is necessary to do so in order to protect the rights of both the taking body and the landowner. Bad faith by regulating government entities should be the exception, not the rule. A "mere nexus" rule also endangers the Government's right as a landowner to play a role in zoning and land use decisions.[7] As such, we adopt the standard applied by the district court and find that in order to have a zoning restriction excluded from a calculation of a property's value, a landowner must show that the primary purpose of the regulation was to depress the property value of land or that the ordinance was enacted with the specific intent of depressing property value for the purpose of later condemnation.

B. Whether a Given Restriction Was Passed for the Primary Purpose of Depressing Property Value is a Matter of Law to Be Decided by the District Court

Appellants contend that the magistrate and district courts erred when they excluded evidence of

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[7] There is also a considerable question of fact whether Appellants could even prove a "nexus" if the court were to adopt this standard. It appears that the Government was merely interested in advancing the same environmental goals as the state. The Zoning Overlay was passed in 1981, more than eight years before Congress expanded the park, more than eleven years before funding was appropriated, and almost twenty years before the property in question was condemned. Such a timetable weighs against a nexus. There does not seem to be anything in the record as overt as the threat-like legislation in *Truro*.

the nexus between the Government and the local zoning board from the Commission. Appellants use our discussion in *320 Acres* to argue that the district court should have tested the sufficiency of Appellants' evidence about the nexus between the Government and the 1981 Overlay, found Appellants' evidence to be sufficient, and submitted the issue to the jury to determine whether the Government interfered in local zoning matters to depress the value of the land in the area east of Everglades National Park. Appellants misunderstand *320 Acres* and the respective roles of the Commission and the trial judge in a condemnation proceeding.

A court in its discretion may order that the issue of "just compensation" in a condemnation proceeding be determined by a commission of three persons appointed by the court rather than a jury. Fed. R. Civ. P. 71.1(h); *United States v. Reynolds*, 397 U.S. 14, 19, 90 S. Ct. 803, 25 L.Ed.2d 12 (1970). A district judge has a much broader role in a condemnation proceeding than he does in a conventional jury trial, and except for the single issue of the amount of just compensation, the trial judge decides all issues, legal and factual, arising in a federal condemnation proceeding. *Id.* at 19-20, 90 S. Ct. 803.

Our very lengthy opinion in *320 Acres* supports the district court's actions here. 605 F.2d 762. *320 Acres* discusses the role of the judge and the fact finder in two contexts: (1) the "scope of the project rule" and (2) the "highest and best use." As discussed above, the "scope of the project" rule is designed to ensure that the landowner is neither hurt nor helped in a takings valuation by any action done by the Government

within the scope of the project leading to the taking.[8] The "highest and best use" rule ensures that "just compensation" takes into account all the possible and probable uses for a property, not just the use to which the current owner is putting it. A use is not possible and probable if it is prohibited by a zoning regulation that is not likely to change.

In discussing the roles of the judge and the fact finder in the context of "best and highest use," we stated:

> [I]n screening proffered potential uses to ascertain whether there is sufficient evidence of their practicability and probability to warrant submission to the trier of fact, the judge must take into account any regulatory restrictions applicable to the property and the proposed use. And if the judge finds that the regulations preclude the proffered use, he must under Rule 71A(h) exclude evidence of that use from the just compensation determination . . . . A legal restriction either applies to the proposed use or it does not-and that is a quintessential question of law for the judge to decide . . . . [However], if the landowner can demonstrate a "reasonable possibility" that a permit would be issued or that re-zoning will occur, thereby freeing the

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[8] For example, if the Government announces that it will establish a park on parcel A, then files an action to take parcel B adjacent to parcel A, the Government should not have to pay for the increased value to parcel A following the Government's park announcement. Likewise, if the Government announces that it will establish a landfill on parcel A, the Government should pay the owner of parcel B the amount it was worth before the Government announced the landfill.

> property for a use which otherwise would be precluded by regulatory restrictions, the owner is entitled to have that "reasonable possibility" considered by the jury, provided of course that the use is otherwise a practicable and reasonably probable one.

In discussing the distinction in the context of the "scope of the project" rule, we found:

> In sum, the judge decides (a) whether the evidence warrants application of the [scope of the project] rule, (b) how the rule should be applied – i.e., whether or not any change in value attributable to the project should be included or disregarded, and (c) where appropriate, the date after which any change in value should be disregarded. But whether there in fact has been any increase or decrease in value due to the project, and by how much, is ultimately for the jury (or commission) to decide as part of its just compensation determination on the basis of the evidence presented it.

Read in conjunction with each other, these discussions make clear that it is for the judge, and not the jury or Commission, to decide Appellants' scope of the project type argument that zoning restrictions passed at the behest of the Government in order to lower property value should be excluded in determining "just compensation."

Here, the district court examined the 1981 Overlay and determined that it applied to Appellants' property and there was no "reasonable possibility" that it would change in the near future. In the absence of

a "reasonable probability" that the regulation would no longer apply, the Commission did not need to hear any evidence about the value of Appellants' property without the regulation. The district court also determined whether the evidence warranted the application of the scope of the project rule. The district court found that the Government's involvement in the passage of the 1981 Overlay was not within "the scope" of its decision seven years later to expand Everglades National Park or its decision nineteen years later to begin condemning properties. Once the district court decided that the rule should not apply, there was no decision for the Commission to make. Because the Commission did not need to decide whether there was "any increase or decrease in value due to the project," there was no need for it to hear any evidence about the value of land without the regulation or about the Government's role, if any, in getting the 1981 Overlay passed. The district court acted correctly in ruling on Appellants' objection regarding the zoning restrictions as a matter of law and in then excluding evidence regarding this objection from the fact-finding Commission.

C. Due Process During the Land Commission Proceeding

Appellants contend that the Commission was biased against them because the Commission was exposed to a "long and steady diet of un-rebutted government presentations" before the Commission heard the instant contested matter.[9] (Appellants'

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[9] Appellants contend that the Government consolidated very small tracts of land, whose owners were less likely to be represented by counsel, in groups for the earliest Commission

(continued...)

Brief, at 24). Appellants aver that rather than assessing Appellants' case on its own individual evidence, the Commission followed the pattern of awards it had developed in prior cases, $500 per acre in uncontested cases and $700 per acre when the landowner appeared *pro se*, when it awarded Appellants $700 per acre for the vast majority of the relevant property. Appellants maintain that the Commission's failure to reference their expert's 1987 comparable and the Commission's reliance on the Government's 1986 comparable illustrates that the Commissioners had closed their minds to new evidence. This court will address (1) whether the scheduling of Appellants' trial violated due process; and (2) whether the Commission's reaction to the 1987 comparable indicates that it was not considering Appellants' case on the basis of its individual facts.

The Government and the trial court have a duty to "facilitate justice" and guard against due process violations in condemnation proceedings involving a large number of similar land tracts with numerous owners. *320 Acres*, 605 F.2d at 770. Because the protection of a jury is not afforded in Rule 71 Land Commission cases, the courts must be "particularly vigilant to ensure that every precaution is taken to

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[9] (...continued)
trials and then selectively dismissed parcels from those trial groups upon notice of the appearance of counsel. In this way, Appellants argue, the Commission was allowed to hear numerous trials with only a Government evaluation expert. Appellants contend that the courts delayed their proceeding until after these trials by failing to rule on their pretrial motions and refusing to set prompt trial dates despite their repeated protests of prejudice. It ultimately took a court order to secure a trial date. Appellants maintain that the court exacerbated the delays in bringing them to trial by reassigning the trial judge and the magistrate judge.

safeguard the rights of individual landowners." *United States v. 5.00 Acres*, 673 F.2d 1244 (11th Cir.1982). A court may violate constitutional due process if it chooses an adjudication mechanism designed to preclude landowners from producing relevant evidence opposing that offered by the Government. *See Sapero v. Mayor & City Council of Baltimore*, 398 Md. 317, 920 A.2d 1061, 1078 (Md. Ct. App. 2007) (holding a court violated due process when it abused state's "quick take" mechanism to take property in absence of real emergency).

Numerous courts have addressed whether it prejudices a landowner who wishes to contest the Government's evaluation of his property, and violates due process rights to have a land commission hear numerous uncontested cases first or at the same time as a contested case. In *5.00 Acres*, the appellants argued that the land commission there had become prejudiced by hearing thirty-nine *pro se* proceedings in which landowners did not effectively present evidence of land values. 673 F.2d at 1247. We found that the landowners had shown no actual bias, much less bias beyond reasonable possibility of disagreement, and stated, "the recitation of numbers proves nothing. The purpose of a commission is to hear all cases for an entire project and achieve some uniformity of result." *Id.*

In *Gwathmey v. United States*, we found that landowners had been denied due process because the Government had consolidated the evaluation of more than 200 tracts of land in one case and did not dismiss the jury to determine the values of each tract until evidence had been presented with regard to all the tracts, making it impossible for the jury to assess the

value of each tract of land on the facts addressing that tract. 215 F.2d 148 (5th Cir. 1954). In *United States v. 75.13 Acres*, landowners claimed a due process violation because the same three commissioners heard all of the condemnation cases involving a particular project. The court rejected this claim and stated:

> The purpose of appointing a commission under Fed. R. Civ. P. 71A(h) is to promote uniformity in compensation by enabling one group of people to establish valuations for all tracts taken in one project . . . . [T]he landowners have not shown that the commissioners were biased against them or failed to consider their case on the basis of their individual facts.

693 F.2d 813, 817 (8th Cir.1982). Our holdings in *Gwathmey* and *5.00 Acres* and the Eighth Circuit's opinion in *75.13 Acres* make clear that having a land commission hear numerous uncontested cases before a contested case is not a per se violation of due process as long as it appears that the Commission evaluated each case on the basis of its individualized facts.

Appellants contend that the Commission failed to consider their case on the basis of their own facts because the Commission's report relied on the Government's 1986 comparable and did not discuss a 1987 comparable which sold for $1,050 per acre and the Commission awarded Appellants a sum similar to what it had awarded in prior cases where the landowners were represented and presented virtually no evidence. The Government contends that given the paucity of proof of the 1987 sale, there was ample basis

for the Commission's decision not to rely on it,[10] and that the Commission issued a sufficient report to justify its ultimate award. As explained above, the instant case turned on the comparable sales offered by each side's expert. The Government's expert offered Comparable 1, a 1986 sale for $700 per acre, just as he had done in numerous prior trials. The Commission had relied upon this sale numerous times in prior trials and did so again in the instant case. Appellants' expert offered the 1987 comparable for $1,050 per acre in the same vicinity to specifically rebut the Government expert's 1986 comparable and to weaken the Government expert's credibility as an appraiser. On cross-examination the Government expert admitted that the 1987 transaction would have figured into his opinion had he known about it. Appellants' counsel reemphasized the Government expert's failure to consider the 1987 transaction in closing argument. In his closing remarks, the Government attorney admitted the 1987 transaction was relevant. Despite

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[10] The Government points out that Appellants' own appraiser elected not to use the 1987 sale to determine fair market value and only used it to review and rebut the Government's appraisal based in part on the 1986 comparable. The Government's appraiser stated that he chose not to consider the 1986 comparable in appraising value because the land records book and page number provided by the Appellants' appraiser for the property were not accurate and he could not locate evidence of the sale. Appellants never entered any documentation of the sale into the record. Appellants respond that their appraiser did not use the 1987 case because he felt it was too old but used it to respond to the Government's appraiser who was using other 1980s cases. Appellants also note that the Government conceded that the 1987 transaction was a valid transaction at trial and that no documentation of any sale, 1986 or otherwise, was put into evidence at trial.

all of the emphasis on the 1987 transaction at trial, the Commission did not even mention it in its report.

We have extensively reviewed the record and have read several of the Commission's opinions preceding this case along with the Commission's report here. We find ample evidence that the Commission considered this case as well as its prior cases on the basis of their own facts. First, the Commission's opinions illustrate that they awarded different per acre values for various pieces of land within the same proceeding and across proceedings. *Compare* DE 148 app. 1 (awarding $650 for a 1.25 acre plot and a 1.14 acre plot) *with* DE 148 app. 8 (awarding $570 for a 1.14 acre plot and $625 for a 1.25 acre plot). Further, there is also no evidence that the Commission consistently awarded more or less in uncontested cases than it did in cases where the landowner appeared *pro se*. *See* DE 148 app. 3 (awarding $500 or $520 per acre to three landowners that appeared *pro se* and $698 per acre for a piece of land that was uncontested); DE 148 app. 27 (awarding $800 to *pro se* landowner and between $500 and $1100 per acre to uncontested land owners); DE 148 app. 21 (awarding $1400 to landowner with counsel but without expert, $700 per acre to *pro se* landowner, and between $500 and $1200 per acre in cases where landowner did not contest). Second, the Commission provided a far more detailed report here than they provided in prior uncontested hearings. Third, the Commission's ultimate $700 award was higher than the $500 per acre amount requested by the Government and awarded in earlier proceedings for similar property. The Commission's decision not to rely upon the 1987 comparable, which Appellants presented as rebuttal rather than in their case an chief, does not alone illustrate that the Commission

failed to consider Appellants' case on the basis of its own facts nor does the Commission's decision not to address the 1987 comparable in its report.

We addressed the requirements for a land commission report in detail in *United States v. 0.21 Acres of Land*, 803 F.2d 620 (11th Cir.1986). There, we found that a land commission report is insufficient if it "merely states that the award constitutes just compensation," without more or "merely summarizes the evidence without providing the commission's analysis." *Id.* at 623.

> [T]he report must indicate the valuation technique employed and the evidence relied on by the commission . . . [as well as] how the commission resolved significant factual disputes and how the resolution affected its determination. Furthermore, the commission may need to explain why it believed certain witnesses and discredited other evidence if substantial evidence conflicts with its conclusion. However, the commission need not provide an overly particularized report . . . . [T]he commission need not make detailed findings such as judges do who try a case without a jury. Instead they should reveal the reasoning they use in deciding on a particular award . . . . In short, the commission need indicate only the basis for its award so that the district court can determine whether the award is clearly erroneous.

Id. (internal citations and quotations omitted). Here, the Commission report "indicate[d] the valuation method the Commission employed, the evidence it

found compelling, and the other factors it considered important." *0.21 Acres*, 803 F.2d at 624. While the Commission likely should have explained why it did not rely upon the informative, if disputed, 1987 comparable, the Commission's failure to do so does not support the conclusion that it failed to consider Appellants' case on the basis of its individual facts.

III. Conclusion

The Land Commission used an acceptable resolution mechanism to obtain uniform results across trials and issued a thoughtful and detailed report. Appellants have not been denied due process, and the district court did not err in deciding that the Commission was not biased and in refusing to grant Appellants a new trial. For these reasons, we AFFIRM.

Appendix B-1

Filed Sept. 15, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

GROUP FORNATORA Cases As Follows:

UNITED STATES OF AMERICA, Plaintiff, v.	
480.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	96-1249-CIV-ZLOCH/DUBÉ TRACT NO. 504-01
30.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-2914-CIV-ZLOCH/DUBÉ TRACT NO. 224-05
40.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-3420-CIV-ZLOCH/DUBÉ TRACT NO. 577-05
80.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-3979-CIV-ZLOCH/DUBÉ TRACT NO. 570-13

120.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-4110-CIV-ZLOCH/DUBÉ TRACT NO. 535-29
80.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-4541-CIV-ZLOCH/DUBÉ TRACT NO. 202-01
170.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al., Defendants. _____/	01-0956-CIV-ZLOCH/DUBÉ TRACT NO. 501-02

REPORT OF LAND COMMISSIONERS

The Commission finds that fair market value of the lands taken in these proceedings to be as is individually stated in the "Conclusion" of this Report. The Conclusion also identifies the dates of the declaration of Taking by the Plaintiff, as reflected in each of the Court files.

APPEARANCES

Douglas R. Wright, Esq. and Andrew M. Goldfrank, Esq. of the U.S. Department of Justice, Environmental and Natural Resources Division appeared and represented the Plaintiff, the United States of America.

Robert C. Byrne, Esq. represented the Defendant/Landowner, Gilbert Fornatora.

Appendix B-3

STATEMENT OF PROCEEDING AND EVIDENCE

These consolidated cases were tried before the Land Commission on August 16-18, 2005, at the United States District Courthouse, Southern District of Florida, in Miami, Florida.

Witnesses

Three witnesses appeared on behalf of the Defendant/Landowner, Gilbert Fornatora, two of whom were retained experts. Robert Miller, a certified appraiser testified as to his determination of the fair market value of the subject parcels. Leigh Kern, a planner and land use expert, provided expert testimony on permissible uses of the land that Mr. Miller used as comparables in conducting his appraisal. Mr. Fornatora, a retired toy designer, testified generally about how he acquired the subject parcels and held them for a number of years up until they were taken in 2000 and 2001.

The United States of America ("the government") called four witnesses. John R. Underwood, a certified appraiser, Charles Thibos, the President of Everglades Alligator Farms, Inc., Sherry Mitchell-Broker, Ph.D. a hydrologist employed by Everglades National Park-South Florida Natural Resources Center, and Robert G. Robbins, a Director of the Natural Resource Management Division of the South Florida Water Management District.

Mr. Underwood testified as to his determination of the fair market value of the subject parcels. Mr. Thibos testified about the Everglades Alligator Farm—a tourist attraction that he owns—and the circumstances surrounding the attraction's purchase of a number of parcels that Mr. Miller used as comparables in his appraisal. Dr. Mitchell-Broker testified about the hydrology on the subject parcels to the water levels and conditions at the Everglades Alligator Farm and several other commercial airboat operations. Mr. Robbins' testimony addressed the South Florida Water Management permitting process and the permitting that would be required for certain uses of the subject parcels.

The Commission accepted Mr. Miller and Mr. Kern as experts on behalf of the Defendant/Landowner and Mr. Underwood and Dr. Mitchell-Broker as experts on behalf of the Plaintiff. The Commission also admitted into evidence all exhibits that were offered by both sides save one: Government's Exhibit 51, a copy of a fax to Mr. Kern.

Appendix B-5

The Subject Properties

There are seven separate tracts of land at issue in this proceeding. They are as follows:

Civil No.	Tract No.	Date of Taking	Size in Acres
00-4541	202-01	11/30/00	80
00-2914	224-05	08/10/00	30
01-0956	501-02	03/09/01	170
96-1249	504-01	07/28/00	480[1]
00-4110	535-29	10/30/00	120
00-3979	570-13	10/20/00	80
00-3420	577-05	09/13/00	40

All of the land tracts are included within the larger land area for which Miami-Dade County enacted significant zoning and land-use restrictions. The restrictions, which were in place long before the taking of the subject properties, substantially limited the uses that could be made of all of the tracts, and those ordinances also increased the required amount of land that would be needed to satisfy or come within any of the approved uses. All tracts fall within the definition of "wetlands" set forth in the Miami-Dade County Code. All of the land tracts in issue are subject to substantial federal and state water regulations, as well as wetland regulations. These local, state and federal regulations have limited the potential uses for these land tracts, and have significantly diminished any

[1] The Defendant/Landowner has only a 25% interest in this tract.

demand for them. In reality, passive recreational use is about the only viable use for any of the properties involved in this action.

All of the tracts at issue are located in Miami-Dade County within the area south of Tamiami Trail (U.S. 41), west of Krome Avenue (S.R. 997), north of Eureka Drive and east of Everglades National Park. Six of the tracts are located in the management area known as 2A. The largest tract, Tract 504-01, straddles the boundary of Management Area 3A and 3C and has acreage in both of those Management Areas. All of the tracts are isolated tracts and not readily identifiable. All except Tract 504-01 are located several hundred yards or more from the closest roadway and can only be accessed through a canal, recreational vehicle, air boat, or swamp buggy, due in part to the water levels. Access to these tracts also requires passing over or through adjoining land tracts.

Section 504-01, though, does have fairly easy access. A portion of Section 504-01 is adjacent to S.W. 237th Avenue. The property is also accessible from a dirt road. Because of its accessibility features, the parties are in agreement that Section 504-01 is more valuable than the other six parcels.

The parties stipulated to the fact that water is, on average, above the surface of the land for 328.5 days on six of the subject properties and for 109 days a year on the remaining parcel, Tract 504-01. The parties also stipulated that all of the properties are classified as wetlands by all the applicable regulatory authorities. The parties further agreed in their pretrial stipulation that all of the properties were vacant when Mr. Fornatora first acquired an interest in them and remain in that unimproved condition today. Moreover,

none of the properties have utilities or carry with them any vested or "grandfathered" rights.

Mr. Fornatora testified that he first acquired an interest in the parcels in the late 1950's or early 1960's. Through direct purchase, inheritance or the liquidation of corporations in which he had an interest that formerly held title to some of the properties, Mr. Fornatora ultimately became the sole owner of Tracts 202-01, 224-05, 501-02, 535-29, 570-13 and 577-05. With respect to Tract 504-01, Mr. Fornatora had a 25% ownership interest that was taken by the government.[2]

The Defendant/Landowner valued all the tracts at $1,500 per acre except Tract 504-01 which he valued at $2,000 per acre. The government, on the other hand, valued the subject tracts at $500 per acre for all the tracts, except Tract 504-01 which, due to its greater accessibility, it valued at $850 per acre. With these parameters set, it is the Commission's task to determine whether the value of the land as of the date of taking was the value advanced by the Defendant/Landowner who bears the burden of proof, that advanced by the government, or somewhere between those two values.

Competing Appraisals

Both appraisers relied on the same definition of "fair market value." They also used the same definition of "highest and best use" which mandates that the use be physically possible, legally permissible, financial feasible and maximally productive. After

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[2] The owners of the other 75% interest in this 480 acre tract had previously reached a settlement with the government and their interest was not part of this proceeding.

performing the highest and best use analysis, both Mr. Miller and Mr. Underwood concluded that the highest and best use of the subject parcels was passive recreational use. Finally, both appraisers concluded that neither the cost approach, nor the income approach, were useful methods to determine the fair market value of the property. Instead, both appraisers used a comparable sales approach.

Mr. Miller, on behalf of the Defendant/Landowner, used sixteen (16) comparables to arrive at his opinion as to the value of the subject parcels at the time of the taking. The per acre price variance within these comparables ranged from $1,196 at the low end to $3,000 at the high end. The government's appraiser used seven (7) comparables that fell within a per acre price range of $200 at the low end to $2,083 at the high end. Because of the very limited market for land in the area where the subject parcels are located, it is somewhat difficult to find useful comparables. Thus, there were problems with many of the comparables used by both Mr. Miller and Mr. Underwood. For example, both appraisers used transactions where clients transferred land to attorneys as payment for legal fees incurred in unrelated matters. Such transactions, where the parties are forced to deal with each other because of an existing debt, can hardly be likened to open market sales and remain suspect.

Only two of the 16 comparables used by Mr. Miller were within the Management Areas covered by Chapter 33B of the Code of Miami-Dade County. Both of those sales involved contract for deed transactions that were originally entered in the early 1980's, but not fully paid off until years later, with the deeds recorded even later in 1995. The other 14 comparables

dealt with parcels outside the Management Area approximately 20 miles or more to the south of the subject parcels. While these tracts outside the Management Area were environmentally sensitive land subject to limiting zoning restrictions, the applicable zoning was not as restrictive as land located within the Management Areas.

Seven of Mr. Miller's comparables involved sales to the Everglades Alligator Farm. Mr. Thibos, who owns Everglades Alligator Farm, testified that he made these purchases to secure the airboat trails that his tourist attraction utilized for its airboat tours. He also testified that he was not interested in land in the vicinity of the subject parcels and only paid the prices he did because of the proximity of the land to his operation and the fact that the parcels he purchased encompassed areas that his airboat tours regularly traversed. Three of the other parcels that Mr. Miller used outside the Management Areas were currently being, or could be, used for agricultural purposes. None of the subject parcels, however, could be put to any type of agricultural use. Another of Mr. Miller's comparables was essentially a land swap where a rock mining company exchanged wetlands desired by the South Florida Water Management District for land which it could use for its mining operations. While Mr. Miller's comparables provided some insight into land values at the time of the taking in the area where the subject parcels are located, none were squarely comparable.

Mr. Underwood's comparables tended to be older than those used by Mr. Miller. Indeed, the only two transactions he considered that took place within the past fifteen years were distress sales that offered little,

if any, insight into the fair market value of surrounding properties. Another transaction used by Mr. Underwood involved a sale by a bank that acquired the property in foreclosure. Again, the circumstances surrounding this transaction requires that any consideration of it as a comparable be heavily discounted.

Mr. Underwood used, as one of his comparables, a 120 acre property that sold for $2,083 per acre. That property, however, was in Management Area 1, which has less stringent use restrictions, and 3C and had road access. Even more importantly though, a house was located on the property. This property was therefore nothing like any of the subject parcels which were not only undeveloped, but essentially undevelopable. It was only included by Mr. Underwood to show the high range for developed property in the Management Areas.

There were two comparables used by Mr. Underwood which, though somewhat dated, could be more closely analogized to the seven parcels that are at issue in this proceeding. Those comparables involve a 1982 sale of 80 acres at $500 per acre (Comparable No. 6) and a 1986 sale of 137.58 acres for $700 per acre (Comparable No. 1). Both of these transactions involved large tracts of land such as those at issue here, and both appeared to be arms-length transactions. Of these two comparables, the 1986 transaction is closer in time to the actual time of the taking.

Some additional comment is required about Tract 504-01. The Defendant/Landowner tried to compare this tract to some of the parcels acquired by the Everglades Alligator Farm in the mid to late 1990's.

To be sure, Tract 504-01 has what most of the parcels in the area lack, accessibility. This would make the tract desirable for airboating if there was enough water on the land for such a use throughout most of the year. The problem is there is not. The lack of water on Tract 504-01 for large portions of the year was convincingly established by the testimony of Dr. Mitchell-Broker. This factor significantly diminished Tract 504-01's suitability as an airboating venue. Thus, without even taking into consideration other factors that made the parcels purchased by the Everglades Alligator Farm more desirable, in any comparison between those parcels and Tract 504-01, the lack of sufficient water on Tract 504-01 for most of the year requires a discounting Tract 504-01's value.

CONCLUSION

The Commission has been instructed by the Court that the Defendant/Landowner has the burden of proof with respect to establishing the value of the land that has been taken in the Declaration of Taking, and this value must be established by a preponderance of the evidence.

Applying this legal standard, the Commission notes that Mr. Miller was a credible witness (as too was Mr. Underwood) who faced a challenging task of valuing property in an area where the market is extremely thin. While the Defendant/Landowner did not establish that the properties were worth the $1,500 and $2,000 per acre that he sought, he did establish that the values were higher than the $500 and $850 per acre values advanced by the government. He also established that there was a slight increase in value over time.

Based upon the following evidence presented, and applying the instructions of the Court, the Commission therefore finds that the Defendant/Landowner in this proceeding is entitled to the following:

Civil No.	Tract No.	Acreage	Date of Value	Value	Area
00-4541	202-01	80	11/30/00	$56,000.00	2A
00-2914	224-05	30	08/10/00	$21,000.00	2A
01-0956	501-02	170	03/09/01	$119,000.00	2A
96-1249	504-01	25% of 480	07/28/00	$108,000.00	3C & 3A
00-4110	535-29	120	10/30/00	$84,000.00	2A
00-3979	570-13	80	10/20/00	$56,000.00	2A
00-3420	577-05	40	09/13/00	$28,000.00	2A

This amounts to a value of $700 per acre for all parcels other than 504-01. The per acre value for 504-01 is $900. The total value of all seven of the parcels involved in this proceeding is $472,000.00.

Objections to this report may be filed within twenty (20) days after being served with notice of the filing of the report. If the parties fail to file objections, they may waive their right to appeal the findings.

DATED at Miami-Dade County, Florida this 8 day of September, 2005.

/s/ Renaldy J. Gutierrez
RENALDY J. GUTIERREZ
/s/ Madelyn Lozano
MADELYN LOZANO
/s/ Kevin J. Murray
KEVIN J. MURRAY

UNITED STATES LAND COMMISSIONERS

Appendix B-14

Filed May 29, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

GROUP FORNATORA Cases As Follows:

UNITED STATES OF AMERICA, Plaintiff, v. 480.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	96-1249-CIV-ZLOCH/DUBÉ TRACT NO. 504-01
30.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-2914-CIV-ZLOCH/DUBÉ TRACT NO. 224-05
40.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-3420-CIV-ZLOCH/DUBÉ TRACT NO. 577-05
80.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-3979-CIV-ZLOCH/DUBÉ TRACT NO. 570-13

120.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-4110-CIV-ZLOCH/DUBÉ TRACT NO. 535-29
80.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,	00-4541-CIV-ZLOCH/DUBÉ TRACT NO. 202-01
170.00 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al., Defendants. _____/	01-0956-CIV-ZLOCH/DUBÉ TRACT NO. 501-02

ORDER ON MOTION TO VACATE AND OBJECTIONS TO REPORT

THESE CAUSES are before the Court on the Motion to Vacate Magistrate's Report & Recommendation Reviewing Land Commission's Report & Recommendation and the Objections to the Report of the Land Commissioners filed by the Defendants. This Court has reviewed the motions and the files in these causes and has conducted a de novo review of the entire record.

The first issue presented to the Court is the contention raised by the Defendants, and not objected to by the Plaintiff, that the Report and Recommendation issued in these causes should be vacated. The basis for this request is the asserted requirement for a de novo review of the Land Commissioner's Report under the applicable law. This Court agrees with the parties that the review must be

de novo and that the objections should be addressed directly by the District Judge rather than the Magistrate Judge. Accordingly, the Motion to Vacate Magistrate's Report & Recommendation (D.E. #158) is **GRANTED** and the Magistrate's Report & Recommendation (D.E. #157) is hereby **VACATED**.

The remaining issues before this Court are the objections raised by the Defendants to the Report of Land Commissioners. Three basic objections were asserted by the Defendants. The first two objections related to the "scope of the project" issues. The Defendants acknowledge that these issues have previously been addressed by this Court and that the objections were being raised for the Court to either reconsider the issues or in order to preserve the issues. No basis has been shown for this Court to reconsider its prior determination on these issues, as reflected in the previously issued Order Adopting Report & Recommendation. (D.E. #127). Accordingly, the first two objections are rejected.

The third objection raised by the Defendants relates to a claim that the procedures utilized by the Land Commissioners and the Plaintiff denied them due process of law. According to the Defendants, the Plaintiff improperly scheduled trial groups in which the landowners were either non-represented or non-existent. According to the Defendants, this gave rise to a predisposition on the part of the Land Commissioners to devalue the land which in turn lead to the refusal by the Commissioners to give any weight to a comparable sale (the Gambach sale), the rebuttal testimony by the appraiser for the Defendants and the closing argument by Defendants' counsel. The Plaintiff counters that the Defendants have shown no evidence

of actual bias and that the Report of the Land Commissioners is supported by the evidence presented.

As noted, the Defendants argue that the overall atmosphere created by the scheduling of the land condemnation trials led the Commissioners to reject the evidence presented on their behalf. However, a review of the record shows that the Commissioners properly examined all of the evidence of comparable sales, including the contested "Gambach" sale and gave specific reasons in the Report for which of the comparable sales were rejected and which were accepted.

The Commissioners explained that between both appraisers, twenty-three comparables were used in total. However, due to the limited market for land around the subject properties, most of the comparables used had various problems. The Commission further detailed its reasons for rejecting Mr. Miller's comparables in two ways: some comparables were outside the Management Areas covered by Chapter 33B of the Code of Miami-Dade County and therefore, the zoning was not as restrictive as the parcels within the Management Areas; and secondly, others were within the Management Areas, but those sales involved contract for deed transactions.

The Court also must reject the Defendants' contention that the Report of the Land Commissioners should be vacated based on a deprivation of due process. The Defendants have failed to present any evidence of actual bias or to show that the specific results in these cases were dictated by any preconceived notion of value rather than by the evidence presented at the hearing in these cases. See, U.S. v. 5.00 Acres in Collier County, 673 F.2d 1244

(11th Cir. 1982). In that case, the Court rejected the assertion that actual bias was present since the land commission had become prejudiced by hearing 39 pro se proceedings in which landowners allegedly did not effectively present evidence of land values at trial. In the present case, a land commission was appointed to hear all cases for the East Everglades National Park and to achieve some uniformity of result. Nothing in the record indicates that the individual landowners' rights have not been preserved. *Id.*, 673 F.2d at 1247.

Accordingly, and based on the foregoing, it is hereby ORDERED AND ADJUDGED that the Report of Land Commission filed on September 15, 2005, covering the tracts set forth in the chart attached hereto, is hereby confirmed and approved and that the Commission's findings of fact are hereby adopted as the findings and conclusions of this Court.

That judgments be and hereby are entered in favor of the Defendants listed in the chart attached hereto and made part hereof, and in the sums designated therein against the United States of America.

Said sums shall be full and just compensation and in full satisfaction of any and all claims of whatsoever nature against the United States of America by reason of the institution and prosecution of this action and taking of the said property interest(s) and all appurtenances thereto belonging.

The said sums shall be subject to all real estate taxes, liens and encumbrances of whatsoever nature existing against the said property at the time of vesting title in the United States. Encumbrances and

charges of whatsoever nature shall be payable and deductible from the said sum.

PROCEDURE FOR DISBURSEMENT

The Clerk of the Court is hereby ordered to disburse the said sum together with any interest accrued to the Defendants upon application to this Court and without further order of this Court, unless the United States files an objection within 10 days. **A form for Application for Withdrawal of Funds is attached to this Order.** In the event that said sum together with any interest remain unclaimed for a period of at least five years from the date of this Order, the Clerk of the Court, pursuant to 28 U.S.C. § 2042, is ordered to cause said sum, together with any interest accrued thereon, to be deposited in the U.S. Treasury in the name and to the credit of the United States of American in trust for the use and benefit of any person entitled thereto.

DONE AND ORDERED in Chambers, in Fort Lauderdale, Florida, this 24th day of May, 2007.

/s/ William J. Zloch

WILLIAM J. ZLOCH

CHIEF UNITED STATES

DISTRICT JUDGE

cc: The Honorable L. Dubé

Service List

Appendix B-20

GROUP FORNATORA

Civil No.	Trace No.	Date of Taking	Size in Acres
00-4541	202-01	11/30/00	80
00-2914	224-05	08/10/00	30
01-0956	501-02	3/09/01	170
96-1249	504-01	07/28/00	480[3]
00-4110	535-29	10/30/00	120
00-3979	570-13	10/20/00	80
00-3420	577-05	09/13/00	40

[3] The Defendants have only a 25% interest in this tract.

Appendix B-21

INSTRUCTIONS FOR COMPLETING APPLICATION FOR WITHDRAWAL OF FUNDS

(1) Landowner shall ***fill in*** this Application.

(2) Landowner's signature shall be ***notarized.***

(3) A W-9 form has been enclosed for your convenience. This form is required by the Court's Financial Department, but ***shall not*** be filed as part of the Court record.

(4) The completed application, along with the W-9 form, shall be ***returned to***:

Judge Robert L. Dubé

United States District Court

Southern District of Florida

300 NE 1st Avenue, Room 112

Miami, FL 33132

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. _____-CIV-ZLOCH/DUBÈ

UNITED STATES OF AMERICA,

Plaintiff,

TRACT NO. _____

v. (EAST EVERGLADES)

_____ ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF DADE, STATE OF FLORIDA, et al.,

Defendants.

_____/

APPLICATION FOR WITHDRAWAL OF FUNDS

(1) Name of Applicant:_____
(Landowner Seeking Funds)

(2) Date of Judgment:_____

(3) Sum Awarded by Judgment:_____

Applicant, _____, states as follows:
(Landowner Seeking Funds)

(a) the fee simple title to the subject property was good according to the records of the Applicant who is entitled to the said sum; and

(b) Applicant warrants that he/she has the exclusive right to the balance of the compensation

herein after payment of taxes plus the interest earned on said balance and that no other party is entitled to the same or any part thereof by reason of any unrecorded agreement.

(c) Applicant agrees that he/she will hold the United States of America and this Honorable Court harmless from any claims made by parties having liens or encumbrances, or other parties who may have been entitled to the said compensation or any party thereof by reason of any unrecorded agreement.

Signature of Applicant:_____

Name of Applicant:_____

Address of Applicant:_____

_____

Telephone No.:_____

I, _____, being first duly sworn

(Landowner Seeking Funds)

on oath depose and say that I have read the foregoing and attached Application for Withdrawal of Funds subscribed by me and know the contents thereof; that the matters therein upon my personal knowledge are true and those status upon information and belief I believe to be true.

Signature of Applicant:_____

Name of Applicant:_____

Address of Applicant:_____

_____

Sworn to and Subscribed before me this ____ day of _____, 200__.

( ) Personally Known to Me, or;

( ) Produced ID _____;

_____

NOTARY PUBLIC/Signature

Appendix C-1

Entered May 27, 2009

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13584-CC

UNITED STATES of America, Plaintiff-Appellee,

versus

480.00 ACRES OF LAND, More or Less, in the County of Dade, State of Florida, et al., Defendants,

Gilbert R. Fornatora, Frank Plattner, et al., Defendants-Appellants.

On Appeal from the United States District Court

for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH and MARCUS, Circuit Judges, and FORRESTER,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

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* Honorable J. Owen Forrester, Senior United States District Judge for the Northern District of Georgia, sitting by designation.

banc (Rule 35; Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

Rule 71.1. Condemning Real or Personal Property

(a) APPLICABILITY OF OTHER RULES. These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) JOINDER OF PROPERTIES. The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.

(c) COMPLAINT.

(1) Caption. The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property — designated generally by kind, quantity, and location — and at least one owner of some part of or interest in the property.

(2) Contents. The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(3) Parties. When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons

who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) Procedure. Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant.

(5) Filing; Additional Copies. In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) PROCESS.

(1) Delivering Notice to the Clerk. On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) Conclusion. The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) Serving the Notice.

(A) Personal Service. When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(B) Service by Publication.

(i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it

is beyond the territorial limits of personal service. Service is then made by publishing the notice — once a week for at least 3 successive weeks — in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(4) Effect of Delivery and Service. Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(5) Amending the Notice; Proof of Service and Amending the Proof. Rule 4(a)(2) governs amending the notice. Rule 4(l) governs proof of service and amending it.

(e) APPEARANCE OR ANSWER.

(1) Notice of Appearance. A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) Answer. A defendant that has an objection or defense to the taking must serve an answer within 20 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) Waiver of Other Objections and Defenses; Evidence on Compensation.

A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant — whether or not it has previously appeared or answered — may present evidence on the amount of compensation to be paid and may share in the award.

(f) AMENDING PLEADINGS. Without leave of court, the plaintiff may — as often as it wants — amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or

(2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional

copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) SUBSTITUTING PARTIES. If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) TRIAL OF THE ISSUES.

(1) Issues Other Than Compensation; Compensation. In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) Appointing a Commission; Commission's Powers and Report.

(A) Reasons for Appointing. If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) Alternate Commissioners. The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace

commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) Examining the Prospective Commissioners. Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate.

(D) Commission's Powers and Report. A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) DISMISSAL OF THE ACTION OR A DEFENDANT.

(1) Dismissing the Action.

(A) By the Plaintiff. If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(B) By Stipulation. Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(C) By Court Order. At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) Dismissing a Defendant. The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(3) Effect. A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) DEPOSIT AND ITS DISTRIBUTION.

(1) Deposit. The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) Distribution; Adjusting Distribution. After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) CONDEMNATION UNDER A STATE'S POWER OF EMINENT DOMAIN.

This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury — or for trying the issue of compensation by jury or commission or both — that law governs.

(l) COSTS. Costs are not subject to Rule 54(d).

1460

(2)

No. 09-505

Supreme Court, U.S.
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NOV 2 3 2009
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IN THE

Supreme Court of the United States

480.00 ACRES OF LAND and
GILBERT A. FORNATORA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When the federal government induces local authorities to limit, by regulation, the use of property that it someday wants to condemn, must the property owner show that depressing the land value was the government's primary purpose or is demonstrating a connection between the regulation and the federal project sufficient to require calculating just compensation based on the property's original value?

2. What standard governs Fifth Amendment due process claims where a property owner alleges that the federal government manipulated the applicable procedural rules to deny the owner a meaningful opportunity to be heard?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION AND INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
ARGUMENT	6
I. THIS CASE PRESENTS SEVERAL BIG-PICTURE ISSUES	6
A. Eminent Domain, Even When Used for Good Reason, Is Prone to Abuse	6
B. The Government Has a Long History of Heavy-Handed Condemnation Blight in the Southern District of Florida	8
C. The Principles Underlying the Uniform Relocation Assistance Act Have Not Been Followed Here	10
II. THE SUPREME COURT SHOULD ADOPT THE NEXUS STANDARD RATHER THAN THE PRIMARY PURPOSE STANDARD BECAUSE THE PRIMARY PURPOSE STANDARD OFFERS PROPERTY OWNERS VIRTUALLY NO PROTECTION	14

TABLE OF CONTENTS—Continued

Page

III. THE SUPREME COURT SHOULD ADOPT A STANDARD FOR THE PROCESS OF CALCULATING JUST COMPENSATION THAT IS CONSISTENT WITH DUE PROCESS, EQUAL PROTECTION, AND THE GENERAL FAIRNESS STANDARDS THE GOVERNMENT IS REQUIRED TO FOLLOW IN MANY SETTINGS 19

CONCLUSION 24

TABLE OF AUTHORITIES

CASES	Page
Berman v. Parker, 348 U.S. 26 (1954)	6
Boddie v. Connecticut, 401 U.S. 371 (1971)	10
Chambers v. Miss., 410 U.S. 284 (1973)	21, 22
Grannis v. Ordean, 234 U.S. 385 (1914)	20
Gwathmey v. United States, 215 F.2d 148 (5th Cir. 1954)	8
Hawaiian Housing Authority v. Midkiff, 467 U.S. 229 (1984)	6
Kelo v. New London, 545 U.S. 469 (2005)	6, 15, 24
Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)	15
Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950)	20
Panetti v. Quarterman, 551 U.S. 930 (2007)	21
Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)	24
Schroeder v. New York, 371 U.S. 208 (1962)	21, 22-23
Shirey v. United States, 359 U.S. 255 (1959)	13
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002)	24
United States v. 5.00 Acres of Land, 673 F.2d 1244 (11th Cir. 1982)	9-10

TABLE OF AUTHORITIES—Continued

Page

United States v. 27.93 Acres, 924 F.2d 506 (3d Cir. 1991) 14, 15

United States v. 222 Acres of Land, 324 F. Supp. 1170 (D. Md. 1971) 17-18

United States v. 320.0 Acres, 605 F.2d 762 (5th Cir. 1979) 9

United States v. 480.00 Acres of Land, 557 F.3d 1297 (11th Cir. 2009) ..... *passim*

United States v. Certain Lands in Truro, 476 F. Supp. 1031 (D. Mass. 1979) 3-4, 17, 18

United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) 23

United States v. Land, 213 F.3d 830 (5th Cir. 2000) 14, 15

United States v. Meadow Brook Club, 259 F.2d 41 (2d Cir. 1958) 14

United States v. Va. Elec. & Power Co., 365 U.S. 624 (1961) 3

Vanhorne's Lessee v. Dorrance, 2 U.S. 304 (1795) 6

Windsor v. McVeigh, 93 U.S. 274 (1876) 23

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. V ..... *passim*

STATUTES

42 U. S. C. § 4601 *et seq* ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

42 U. S. C. § 4621 11

42 U. S. C. § 4651 ..... 11-12, 13

RULES

Fed. R. Civ. P. 71.1 ..... 4, 8

OTHER AUTHORITIES

Building Empires, Destroying Homes: Eminent Domain Abuse in New York (Institute for Justice, Arlington, VA), Oct. 2009 6

Dana Berliner, *Public Power, Private Gain* (Institute for Justice, Arlington, VA), Apr. 2003 6

Gideon Kanner, *Condemnation Blight: How Just is Just Compensation?*, 48 NOTRE DAME L. 765 (1973) 7

Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES, Nov. 13, 2009, at A1 6-7

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480.00 ACRES OF LAND and
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BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* [1]

In this case, the Eleventh Circuit found that the low compensation that petitioner Gilbert Fornatora received for the taking of his land did not violate the Fifth Amendment's Takings Clause. Specifically, the

[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no persons other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

court held that when the federal government induces a local authority to increase regulation on property and then condemns it, the property owner must show that the government's sole motive or primary purpose was to lower his property values if he is to avail himself of the protections of the "scope of the project" rule. Under this rule, a property owner's just compensation does not reflect the diminution in value caused by the imminence of the government's project or government action related to it.

Unfortunately, this decision is consistent with three other circuit court decisions that severely restrict a property owner's protections under the scope of the project rule, but it is inconsistent with federal district court decisions in two other circuits and the Fifth Amendment's Takings Clause.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes the annual *Cato Supreme Court Review* and files *amicus* briefs with the courts. This case is of central concern to Cato because it implicates the rights the Fifth Amendment provides property owners during the condemnation process.

STATEMENT OF THE CASE

This case arises from the federal government's condemnation of petitioner Gilbert Fornatora's property in Florida. The federal government pressured local authorities to enact significantly more onerous land-use regulations in anticipation of taking the property as part of an expansion of a national park. These increased regulations had the natural result of sharply limiting the profitable uses of the property

and thus depressing its value. This depression of the property value benefited the government in that the government ended up paying Fornatora less compensation for the taking. The government's actions during the subsequent condemnation proceedings also suppressed the compensation awarded to Fornatora: it manipulated the federal land commission charged with determining compensation for the affected property owners. This manipulation further denied Fornatora a meaningful opportunity to be heard and to receive just compensation for his taken property.

Fornatora's petition raises two important issues. The first is the proper standard governing the payment of just compensation in condemnation cases where the federal government uses its influence to encourage local governments to increase regulations that also depreciate the value of targeted property. Such actions implicate the Court's "scope of the project" rule. This rule states that increases or decreases in the property's value that result from the project itself may not be considered when determining just compensation. *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 636 (1961).

There is a split within the federal courts as to what standard should be used to evaluate whether a property owner can benefit from the scope of the project rule. In some circuits, owners must show a nexus between the regulation and the federal project or that the federal government induced the local authorities to enact the regulation. Under this "nexus" or "inducement" standard, the impact is what counts; the court looks to whether the federal efforts to regulate the targeted property affected its value, regardless of the motive behind those efforts. *See, e.g.*, *United States v. Certain Lands in Truro*, 476 F. Supp.

1031, 1034-36 (D. Mass. 1979). In other circuits, including the Eleventh Circuit—where Fornatora's case originated—owners cannot avail themselves of the scope of the project rule unless they prove that the federal government's motive or primary purpose in encouraging the regulation was the depression of property values to pay less compensation. *United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1308-11 (11th Cir. 2009).

Importantly, only the nexus or inducement standard comports with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U. S. C. § 4601 *et seq*. Though this Act does not create private rights of action, it does lay out general principles of fair dealing by which the government must abide when it exercises its eminent domain powers. The government has failed to follow these principles here.

The second issue here is the need for a proper standard by which to judge whether a petitioner has received a meaningful hearing—a hearing that is sufficient to protect his due process rights under the Fifth Amendment in the context of a Federal Rule of Civil Procedure 71.1 condemnation process. The lower court's approach to Fornatora's claims regarding government manipulation of the land commission process illuminates the need for a uniform set of rules to use when determining if a given process of calculating just compensation was indeed just.

REASONS FOR GRANTING THE PETITION

The Supreme Court needs to establish uniformity in two central areas of property rights law. First, property owners are receiving different levels of constitutional protection from government activities that diminish their property values in the context of eminent domain. In several circuits, property owners are required to meet a *mens rea* burden of proof—demonstrating that the government's sole motive or primary purpose was to lessen compensation—that means they will only be protected from the most flagrant abuses where government officials are indiscreet enough to admit such a motive. In the district courts of two other circuits, property owners are required to meet a more realistic standard—nexus or inducement—that offers considerably more protection and, most importantly, reflects the spirit and intent of the Takings Clause. The nexus or inducement standard also better fits the purpose of the scope of the project rule, by protecting owners from project-related depreciation regardless of whether bad faith can be proven. The Court should decide that in all takings cases where the federal government encourages a local government to regulate property to facilitate a future federal project and where such regulation results in market depreciation, the property owner need only establish that there was federal-local collaboration and a nexus between the local regulation and the federal project.

Second, the lack of an established standard for evaluating due process, equal protection, and general fairness in the eminent domain land commission process leaves property owners' constitutional right to just compensation unprotected. The Court should recognize a meaningful standard for this process.

ARGUMENT

I. THIS CASE PRESENTS SEVERAL BIG-PICTURE ISSUES

In considering the larger issues embedded in this case, the Court should consider the abusive potential of the eminent domain power, a particular history of its abuse in South Florida, and the purpose and scope of the Uniform Relocation Assistance Act of 1970 as it relates to "condemnation blight" cases like this one.

A. Eminent Domain, Even When Used for Good Reason, Is Prone to Abuse

The U.S. Supreme Court has consistently sided with the government in cases in which property owners have challenged the government's use of eminent domain—"the despotic power." *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795); *see also Kelo v. New London*, 545 U.S. 469 (2005); *Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). The Court has acknowledged that it has taken a broad view of the eminent domain power. *Kelo*, 545 U.S. at 479 ("[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'"). This permissive view of eminent domain has led to many documented cases of the taking of private property for private gain. *See, e.g., Building Empires, Destroying Homes: Eminent Domain Abuse in New York* (Institute for Justice) (Oct. 2009) (documenting extensive eminent domain abuse in New York State); Dana Berliner, *Public Power, Private Gain* (April 2003) (five-year state-by-state report examining eminent domain abuses); *see also* Patrick McGeehan, *Pfizer to Leave*

City That Won Land-Use Case, N.Y. TIMES, Nov. 13, 2009, at A1.

But the taking of private property for private gain is not the only threat in the modern eminent domain landscape. The devaluing effects of the government's pre-condemnation activities—for example, newspaper articles announcing plans for condemnation years in advance, or adding zoning restrictions in advance of condemnation—known as "condemnation blight," are a significant threat to property owners' right to just compensation. *See generally* Gideon Kanner, *Condemnation Blight: How Just is Just Compensation?*, 48 NOTRE DAME L. 765 (1973).

Insofar as the Court's takings jurisprudence has broadly interpreted the government's eminent domain powers and thereby encouraged its use for private gain, the Court has a moral obligation to address the long-neglected subject of compensation. Indeed, the problem of condemnation blight as illustrated in this case shows that even when the government follows the original meaning of the Takings Clause and condemns property for a true public use, eminent domain still holds the potential for abuse without an adequate process for calculating just compensation. Having sanctioned this broad eminent domain power, the Court owes it to condemnees to formulate standards governing the calculation of compensation.

This case offers the Court the opportunity to recognize such standards along two elements of the process: the standard for when property owners can invoke the scope of the project rule and the standard for what constitutes a meaningful hearing, sufficient to protect a property owner's right to due process

under the Fifth Amendment, in the context of the federal condemnation process.

B. The Government Has a Long History of Heavy-Handed Condemnation Blight in the Southern District of Florida

Even before the enactment of Fed. R. Civ. P. 71.1, the Fifth Circuit heard a case from the Southern District of Florida regarding the previous, but similar, valuation procedures. *Gwathmey v. United States*, 215 F.2d 148 (5th Cir. 1954). In *Gwathmey*, over 200 property owners contested the valuation of their condemned land and were brought before a single jury with little opportunity to cross-examine government witnesses. 215 F.2d at 152. While the government argued that this process was necessary to prevent exceedingly long and expensive trials, the court noted that it created confusion and placed a heavy evidentiary burden on the jury. *Id.* at 155-56.

The Fifth Circuit found that while expediency and minimized expense were desirable, "the *primary* consideration is the individual landowner's Constitutional right to due process and just compensation". *Id.* at 156 (emphasis in original). Acknowledging the difficulties of multiple-owner condemnation proceedings, the court did not attempt to set down any particular formula, but asked only that chosen procedures continue to give the "full and fair treatment which would be given a single owner". *Id.* at 157. Unfortunately, authorities in South Florida have not heeded that advice.

In 1979, the Fifth Circuit addressed a case rife with procedural errors and government abuse and decided that the appellants had not received just compensation under the Fifth Amendment. *United*

States v. 320.0 Acres, 605 F.2d 762 (5th Cir. 1979). *320.0 Acres* contains troubling parallels to the present case because it involved many parcels of land, and so the government should have dutifully worked to ensure that this complex process was fair, but instead it ensured that it paid property owners as little as possible. *Id.* at 770 ("Unfortunately, the Government attorneys, at least in this case, did not shoulder their responsibility for facilitating justice in these unusual circumstances, but instead assumed the distinctly adversarial role more appropriate to the conventional one-on-one litigation, the cumulative result of which was that the landowners before us on appeal were not afforded the due process guaranteed them by the Fifth Amendment.").

The court detailed its concerns about the behavior of government attorneys in *320.0 Acres* in a significant footnote that described the government's misleading the court and opposing counsel with regard to filings and winning significant motions as a result. *Id.* at n.22. The Fifth Circuit concluded that the lower court and the government did not meet their burden of facilitating justice and instead deprived the landowners of their Fifth Amendment due process rights. *Id.* at 770.

In 1982—after the Fifth Circuit split—the Eleventh Circuit heard a case depressingly similar to the instant case. *US v. 5.00 Acres of Land*, 673 F.2d 1244 (11th Cir. 1982) (per curiam). The Secretary of the Interior began condemnation proceedings to gain approximately 570,000 acres of land for the Big Cypress National Preserve and appointed a commission to determine property values. *Id.* at 1246-47. The property owners in *5.00 Acres* alleged that the commission process was flawed in first hearing 39

pro se proceedings that did not present adequate evidence of property value.

The court highlighted an important fact regarding land commissions, that "[b]ecause the protection of a jury is not afforded, the courts must be particularly vigilant to ensure that every precaution is taken to safeguard the rights of individual landowners". *Id.* at 1247. Still, the Fifth Circuit, in a scant *per curiam* opinion, found that the owners had not presented evidence of bias sufficient to prove a due process violation. *Id.*

While *5.00 Acres* turned on such a factual determination, the present case shows general and continuing problems with land commission proceedings in South Florida, with the government violating this Court's admonition that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *see infra*, Part III.

More recent cases abound—with eminent domain abuse by all levels of governments—but the above three give a flavor for the condemnation blight that has been rampant in the region for quite some time.

C. The Principles Underlying the Uniform Relocation Assistance Act Have Not Been Followed Here

Federal policy reflects the importance of fair dealing when it comes to the deprivation of private property. On January 2, 1971, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 42 U. S. C. § 4601 *et seq*. Though this Act does not create a private right of action, it does lay out general principles of fairness

by which the government must abide. A review of the Act shows that the government has failed to follow these principles in this case.

The Act's stated intention is to establish "a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance." *Id.* at § 4621(b). The Act also states that "minimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities." *Id.* at § 4621(a)(4).

The Uniform Act provides a number of guidelines that such projects must follow to minimize the adverse effects of eminent domain. The guidelines in § 4651, the "Uniform policy on real property acquisition practices," are particularly relevant to this case because they deal with the acquisition and valuation of condemned property. Subsection 1 instructs the head of a federal agency to "make every reasonable effort to acquire expeditiously real property by negotiation."

In this case, as early as the late 1970s, the National Park Service ("NPS") expressed interest in acquiring land, which included Fornatora's tracts, to expand Everglades National Park. Though NPS received Congressional authorization to expand the park in 1989, formal condemnation proceedings did not being until 2000. *480.00 Acres*, 557 F.3d at 1300. More than 20 years passed from the time the government expressed interest in acquiring Fornatora's land to the initiation of condemnation proceedings. Such delays can hardly be considered expeditious.

More importantly, § 4651(3) deals directly with the fair market valuation of property identified for condemnation, particularly in regard to the effect a project can have prior to the official valuation. Subsection 3 provides:

> Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

42 U.S.C. § 4651(3).

Congress enacted this provision with the full understanding that to be fair to the owner of the condemned property, the valuation should be made without taking into account the effects of the potential condemnation plan. Regardless of whether a condemnation plan is enacted, the mere possibility of such an action is enough to decrease the property's market value. The obvious impact is that potential buyers are deterred from paying full market value for a tract identified for possible condemnation because of the increased likelihood that the government will deny them use of their new purchase.

In this case, the NPS created a likelihood that it would seek to acquire the Fornatora property before the condemnation proceedings or even the formal authorization. The NPS expressed its ecological concern that the land east of Everglades National Park, which includes Fornatora's tracts, should have been included in the original boundaries of the Park.

480.00 Acres, 557 F.3d at 1300. Combining this suggestion and the federally initiated and funded study, the Everglades Resource Planning Project ("EERP"), the likelihood of the Park's expansion appeared imminent as early as the late 1970s. *Id.* Section 4651(3) obligated the land commission charged with valuing the condemned properties on behalf of the NPS to disregard the effect these government actions had on the fair market value of the condemned properties.

The Uniform Act, particularly § 4651, expresses Congress's clear intent that the owners of private property subject to condemnation are to be dealt with in a fair and expeditious manner. The valuation of their property is not to include any variation caused by the public improvement for which it is acquired or by the likelihood that the property would be acquired.

The federal government engaged in related public improvement through its EERP study that, contrary to its findings, recommended a more stringent zoning regulation, thereby decreasing the market value of the properties. It also expressed its position that the land should be part of the Everglades National Park—increasing the likelihood of its acquisition—which also decreased the market value. Under the Uniform Act's § 4651(3), neither decrease should have been considered in the valuation of the condemned properties. Even though the Act does not create a cause of action for an individual, the government still must follow the statute. "Statutes . . . are not inert exercises in literary composition. They are instruments of government . . . ." *Shirey v. United States*, 359 U.S. 255, 260 (1959).

II. THE SUPREME COURT SHOULD ADOPT THE NEXUS STANDARD INSTEAD OF THE PRIMARY PURPOSE STANDARD BECAUSE THE PRIMARY PURPOSE STANDARD OFFERS PROPERTY OWNERS VIRTUALLY NO PROTECTION

The Supreme Court must provide guidance because lower courts are following different standards: some apply a primary purpose or motive standard and some a nexus or inducement standard. These standards demand significantly different burdens of proof and therefore offer drastically different levels of protection for property owners.

In the Second Circuit, Third Circuit, and Fifth Circuit, courts employ a sole motive or primary purpose standard. *See United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958); *United States v. 27.93 Acres*, 924 F.2d 506 (3d Cir. 1991); *United States v. Land*, 213 F.3d 830 (5th Cir. 2000). Under this type of test, a property owner can only avail himself of the benefits of the scope of the project rule and avoid suffering from the depression in value caused by pre-condemnation government regulation when he can show that the government regulated solely or primarily to lower property values and pay less compensation for the taking. This test is not applied in precisely the same manner across the Second, Third, and Fifth Circuits.

In the Second Circuit, the property owner must prove that the government's sole motive in opposing a rezoning that would have increased the property value was to depress the property values in advance of condemnation. *Meadow Brook Club*, 259 F.2d at 45. This test also requires that no coincident government rationales for the action exist. *Id.*

In the Third Circuit, the test is even more demanding; proof of sole motive is not sufficient to avail property owners of the scope of the project rule's protection if any other factor could be pointed to as the proximate cause of the local zoning decisions. *27.93 Acres*, 924 F.2d at 514 (noting that even if the court accepted the appellant's argument that the federal government played some role in the local government's denial of appellant's zoning request, that would not prove that the government's action was the "but for" cause).

The Fifth Circuit has adopted a slightly less demanding test than the Second or Third Circuits. There, a property owner must show that the government's primary purpose in denying his permit was to depress property values before condemnation. *Land*, 213 F.3d at 835-36. But this test still requires a level of proof that only the most incompetent government bureaucrats would make available.[2]

These three cases—and the Eleventh Circuit's decision in *480.00 Acres*—leave property owners in those jurisdictions woefully unprotected from eminent domain abuse because the burden of proof they require could rarely be met other than when a careless

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[2] In her *Kelo* dissent, Justice O'Connor expressed concern regarding the court's ability to "divine illicit purpose." *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) ("The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."). With such deferential tests, it is virtually impossible to prove government malfeasance in takings cases. *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (criticizing the just compensation test as one which determines "whether the legislature has recited a harm-preventing justification for its action," which amounts to nothing more than "a test of whether the legislature has a stupid staff").

government official states on the record that a zoning change was done for the primary purpose of depressing property values or whatever particular language would be necessary for the other versions of the standard. Further, these decisions are at odds with decisions from federal district courts in the First and Fourth Circuits.

District courts in the First and Fourth Circuits have applied a standard that is more realistic in promoting the policy underlying the scope of the project rule. Just as important, these cases have included facts more similar to those present here than the facts of the cases on the other side of the split. In the Second, Third, and Fifth Circuit cases, the government had taken steps to influence local authorities to maintain zoning status quo rather than approving changes that might increase property values in advance of a taking. When property owners protested that federal interference in the local process had deprived them of the additional compensation they would have been owed under the decreased regulatory regime, the courts were unmoved. The two district court cases are distinctly different because the federal government allegedly initiated to lobby for large scale downzoning to protect the contemplated project area from further development. The Eleventh Circuit did not appreciate this important factual distinction and declined to protect petitioners under the scope of the project rule. *480.00 Acres*, 557 F.3d at 1300.

In the District of Maryland (in the Fourth Circuit) and the District of Massachusetts (in the First Circuit), courts have reviewed cases factually similar to *480.00 Acres* using a standard that offers property owners a measure of protection from eminent domain

abuse. *United States v. 222 Acres of Land*, 324 F. Supp. 1170 (D. Md. 1971) and *United States v. Certain Lands in Truro*, 476 F. Supp. 1031 (D. Mass. 1979).

In Maryland, the federal government pressured the state to prohibit development of shoreline property in part to protect the public safety and welfare and in part in anticipation of federal eminent domain proceedings. *222 Acres*, 324 F. Supp. at 1175 (U.S. Secretary of the Interior asked the governor of Maryland not to allow development of the specific areas because allowing such development would enhance land values and thus require higher compensation once eminent domain proceedings began). After the federal government eventually condemned the property, the court considered the just compensation issue. It rejected the government's argument that development prohibitions should not be taken into account in calculating property values. The court decided that even though the regulations at issue served some general public safety and welfare benefit, the federal government had induced their enactment and therefore could not benefit from them during the calculation of just compensation.

This decision enabled the property owners to be protected by the scope of the project rule and receive compensation based on the value of their property before the state prohibited further development on the recommendation of the federal government. *Id.* at 1180. Unlike the Second, Third, Fifth, and Eleventh Circuits, the District of Maryland decided that no showing of primary purpose or sole motive was required; instead, proof that the federal government had induced the local authorities to regulate was

sufficient to protect the property owners from the diminution of value caused by those regulations. *Id.*

In Massachusetts, the federal government suggested to local Cape Cod officials that certain land use restrictions be instituted. This suggestion came in anticipation that the federal government would take land to complete a national seashore project. *United States v. Certain Lands in Truro*, 476 F. Supp. 1031, 1032 (D. Mass. 1979). The affected property owners sought the protection of the scope of the project rule, arguing that the federal government caused town officials to restrict uses within the seashore area differently than zoning applied elsewhere in the town. *Id.* at 1035. The District of Massachusetts decided that the regulations were indeed motivated and induced by the federal government—even if they were valid exercises of the local government's police power—and therefore any diminution in value they caused could not be taken into account in determining how much compensation the government would pay the affected property owners. *Id.* at 1035-36. Like the District of Maryland, the District of Massachusetts decided that proof that the federal government had induced the local authorities to regulate was sufficient to prevent the federal government from taking advantage of paying a reduced level of compensation reflecting the diminishing effect of the regulations. *Id.*

III. THE SUPREME COURT SHOULD ADOPT A STANDARD FOR THE PROCESS OF CALCULATING JUST COMPENSATION THAT IS CONSISTENT WITH DUE PROCESS, EQUAL PROTECTION, AND THE GENERAL FAIRNESS STANDARDS THE GOVERNMENT IS REQUIRED TO FOLLOW IN MANY SETTINGS

In addition to clearing up the split of authority regarding the standard for applying the scope of the project rule, the Supreme Court must also establish a standard for evaluating whether the calculation of just compensation is consistent with due process, equal protection and general fairness. By allowing the government first to bring unrepresented property owners before the land commission to establish lower compensation precedent, and then to use that precedent later to pay less compensation to represented property owners—despite their presentation of evidence to the contrary—the Eleventh Circuit failed to protect property owners in the face of significant constitutional concerns.

Indeed, property owners who came to court with counsel and were then dismissed and brought back later when precedent had been stacked against them were denied a meaningful opportunity to be heard. This Court has recognized petitioners' right to an opportunity to be heard—beyond *pro forma* proceedings—in a variety of settings, and it should recognize that right in this setting as well.

The courts below failed to protect petitioner's procedural due process rights by allowing the federal government first to bring unrepresented property owners before the land commission to establish a precedent for lower compensation, then later wielding

that precedent against represented property owners who presented individualized evidence warranting a higher valuation for their property. Justice Pitney is often cited for his statement that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This is particularly important when the due process requirement arises from the deprivation of a fundamental right.

Justice Jackson noted that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Here, the government manipulated the sequencing of cases in order to deny represented property owners a meaningful opportunity to be heard: it denied them the opportunity to present individualized evidence to open-minded commissioners by arranging the hearing schedule to first set low valuation precedents in *pro se* hearings. (The record below shows that government attorneys voluntarily dismissed from the early trial groups any defendant landowners for whom counsel entered an appearance).

The Supreme Court's jurisprudence broadly supports this principle—the right to a meaningful hearing—across various areas of law. Whether it is a death row inmate's plea to be allowed to make arguments that could prevent his execution, a criminal defendant's desire to present evidence in his own defense, or a property owner's need for adequate notice of condemnation proceedings, this Court has

held that due process requires petitioners be provided the opportunity to be heard as a matter of fundamental right. *See generally, Panetti v. Quarterman*, 551 U.S. 930 (2007); *Chambers v. Miss.*, 410 U.S. 284 (1973); *Schroeder v. New York*, 371 U.S. 208 (1962). Justice requires that if one is to be deprived of life, liberty or property, one must be provided with a meaningful hearing.

In *Panetti*, the petitioner sought habeas review of his capital conviction for murder in light of his apparent mental illness. Even though he tried to present evidence of his illness, Texas state courts and the Fifth Circuit held that a state can execute a person with mental defects convicted of a capital offense if the person is aware of the punishment and the crime for which he will receive it. *Panetti*, 448 F.3d at 818 (citing *Ford v. Wainwright*, 477 U.S. 399, 421-22 (1986)). In his majority decision, Justice Kennedy pointed out that *Ford* also required that "[o]nce a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Panetti*, 551 U.S. at 949. This Court protected the petitioner's due process right to present evidence of his severe delusions, delusions that prevented him from appreciating the gravity of the punishment that would take his life.

Since its inclusion in the Bill of Rights, the Sixth Amendment has provided criminal defendants with the right to confront and call witnesses in their defense. Exercising this right, the petitioner in *Chambers* called a witness to introduce the witness's written confession of guilt for the crime with which the petitioner was charged. Surprisingly, on cross-

examination, the witness retracted and provided an alibi. *Chambers*, 410 U.S. at 287-88. The Mississippi Supreme Court upheld the trial court's denial of the petitioner's motion to reexamine the witness as adverse and to exclude a plethora of other statements of confession made by the witness. *Id.* at 291-94. In an opinion reversing that judgment, Justice Powell noted that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* The U.S. Supreme Court thus overruled Mississippi's "Voucher Rule," which prevented defendants from cross-examining their own witnesses based on the archaic notion that by calling a witness, one "vouches for his credibility." *Id.* at 295 (citation omitted). Powell concluded "that the exclusion of this critical evidence, coupled with the State's refusal to permit [petitioner] to cross-examine [the witness], denied him a trial in accord with traditional and fundamental standards of due process." *Id.* at 302.

These cases deal with the due process protections afforded to criminal defendants for the fundamental rights to life and liberty, but property rights require the protection of due process as well. In *Schroeder*, for example, the City of New York decided to invoke its legislated power to divert a river 25 miles upstream toward the petitioner's property. *Schroeder*, 371 U.S. at 208. New York provided statutory notice to the City Record, with ads in two major newspapers and two local papers. Yet none included the procedure to contest the action or claim compensation and none were posted in the vicinity of petitioner's then-vacant premises. *Id.* The petitioner was thus unaware of the proceedings and failed to file a claim for damages within the prescribed three-year period. *Id.* at 210-11. Justice Stewart, writing for a unanimous

Court, held that the notice was insufficient and denied the petitioner the constitutionally requisite "opportunity to present their objections." *Id.* at 212. Stewart found that the right is so important that the government is obliged to give personal notification of proceedings, which could have been provided by a simple posted letter. *Id.* at 214.

The right to a meaningful opportunity to be heard has also been upheld in civil forfeiture cases. In *Windsor v. McVeigh*, a federal district court marshal seized the property of a Confederate Army officer under the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." *Windsor v. McVeigh*, 93 U.S. 274, 275 (1876). Though the owner filed a claim asserting his right, the lower court struck down his motion, denying him a hearing. *Id.* at 276. Even during such a volatile period as Reconstruction, this Court upheld the right to an opportunity to be heard for a former rebel in defense of his property, asserting that whenever one "is assailed in his person or his property, there he may defend, for the liability and the right are inseparable." *Id.* at 277.

This Court has continued to uphold the same principle in more recent civil forfeiture cases. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993). In *James Daniel Good*, petitioner's real property was forfeited due to his drug crime conviction. *Id.* at 46. Even though the federal civil forfeiture statute allows *ex parte* confiscation, the Court held that, absent exigent circumstances, the government must provide an opportunity to be heard before the seizure of property. *Id.* at 62.

Finally, the Court has recognized that the federal government has a general obligation to fairness in the eminent domain context. The Court has repeatedly noted that fairness and justice are inherent in the Takings Clause. *See, e.g.*, *Kelo*, 545 U.S. at 497 (noting that Fifth Amendment requirements promote fairness as well as security); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) ("The concepts of 'fairness and justice' . . . underlie the Takings Clause"); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting the Fifth Amendment's concern for fairness and justice). The Court should decide that this obligation was not met here by the process approved by the Eleventh Circuit.

Indeed, here the government denied Fornatora his meaningful opportunity to be heard by manipulating the scheduling of hearings in order to establish low valuation precedents, thereby violating his due process rights.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in this case.

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146

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In the Supreme Court of the United States

480.00 ACRES OF LAND AND GILBERT A. FORNATORA, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When it is alleged that the federal government has induced local authorities to increase regulation of property the United States then condemns, and the property owner seeks to have the regulation's effects disregarded under the "scope of the project" rule—under which changes in a property's value resulting from the project itself may not be considered in determining just compensation—must the owner show that the federal government's sole motive or primary purpose was to depress land value, or merely demonstrate a nexus between the regulation and the condemnation?

2. What standard governs due process claims under the Fifth Amendment, where a property owner alleges that the federal government has manipulated the Fed. R. Civ. P. 71.1 land commission process to artificially depress just compensation payments by denying an owner a meaningful opportunity to be heard?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT 4

ARGUMENT 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Amen v. *City of Dearborn*,
718 F.2d 789 (6th Cir. 1983) 6

Chicago, Burlington & Quincy R.R. v. *Chicago*,
166 U.S. 223 (1896) 7

City of Sparks v. *Armstrong*,
748 P.2d 7 (Nev. 1987) 7

Gwathmey v. United States,
215 F.2d 148 (5th Cir. 1954) 10

Jones v. *People ex rel. Dep't of Transportation*,
583 P.2d 165 (Cal. 1978) 7

Kirby Forest Indus., Inc. v. *United States*,
467 U.S. 1 (1984) 1

Lange v. *State*,
547 P.2d 282 (Wash. 1976) 8

Nollan v. *California Coastal Comm'n*,
483 U.S. 825 (1987) 9, 11

Roth v. *State Highway Comm'n*,
688 S.W.2d 775 (Mo. App. 1985) 7

United States v. *5.00 Acres of Land*,
673 F.2d 1244 (11th Cir. 1982) 9, 10

United States v. *222.0 Acres of Land*,
324 F. Supp. 1170, 1175 (D. Md. 1971) 6, 7

United States v. *480.00 Acres of Land*,
557 F.3d 1297 (11th Cir. 2009) 6, 8

United States v. *Certain Lands in Truro*,
476 F. Supp. 1031 (D. Mass. 1979) 7

United States v. *Land*,
212 F.3d 830 (5th Cir. 2000) 6

United States v. *Meadow Brook Club*,
259 F.2d 341 (2d Cir. 1958) 6

United States v. *Virginia Elec. & Power Co.*,
365 U.S. 624 (1961) 5, 6

Village of Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) 8

STATUTES AND RULES

Fed. R. Civ. P. 77.1 .....1, 4, 8, 10

OTHER AUTHORITIES

Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 REAL ESTATE L.J. 47 (1998) 6

U.S. Const., amend. v 1, 7

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Among the Fifth Amendment's fundamental protections is the guarantee that no private property shall "be taken for public use, without just compensation." U.S. Const. amend. v. Under established principles of eminent domain, the "just compensation" for land acquired by condemnation is "the fair market value of the property on the date it is appropriated." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984).

This case presents the important and recurring question of how to measure "just compensation" where the federal government, anticipating that it will be condemning land, induces local authorities to impose regulations on a property that depress its fair market value. It also presents the question of what standard governs a due process claim where, as here, the government appears to have manipulated the land valuation commission process in order to set an artificially low baseline valuation by moving unrepresented, *pro se* landowners to the front of the valuation line.

These questions call out for resolution by this Court. In order to introduce uniformity into the federal valuation process, Congress enacted Federal Rule of Civil Procedure 71.1, which establishes a sys-

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The NFIB Small Business Legal Center is filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

tem of federal land valuation commissions. But, as shown in petitioners' brief and below, the legal standards under which these commissions (and their state counterparts) operate are in disarray. Courts in different circuits apply different tests to determine whether locally-imposed regulations are part of the scope of the federal project, and thus excluded in determining fair market value. And no nationally-accepted standard has evolved for determining when the government's manipulation of the commission process amounts to a denial of due process.

These inconsistencies are a matter of national concern; they affect hundreds of millions of dollars of condemned property valuations each year. And the burden of these inconsistencies falls largely on individuals and small business owners, many of whom appear before valuation commissions without legal representation.

Amicus National Federation of Independent Business Small Business Legal Center ("NFIB Small Business Legal Center") has a vital interest in this Court's resolution of the questions presented. The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). Founded in 1943, the NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. NFIB represents about 350,000 businesses throughout the country; its membership includes single-person enterprises, family farms, retailers, and manufacturing firms. Its mission is to promote and protect the right of its members to own, operate, and grow their businesses.

One important function of the NFIB Small Business Legal Center is to represent the interests of small business owners in potentially precedent-setting cases. Since its launch in 2000, the Legal Center has filed over 100 *amicus* briefs in state and federal courts.

The NFIB Small Business Legal Center is acutely aware that the most valuable asset that many small business owners have is the real property on which their businesses are located. Eminent domain forces small businesses to relinquish this asset without full compensation for subjective, but nevertheless substantial, harms—including relocation expenses, business goodwill, legal expenses, and the cost of replacing condemned property. Losses related to condemnation and undervaluation impose special hardships on small businesses, which may be unable to reopen or may fail in a new location.

The NFIB Small Business Legal Center thus seeks rules that will protect even *pro se* small business condemnees from government manipulation of fair market value compensation—either through manipulation of local regulations in advance of condemnation, or through the gaming of the commission process to artificially depress valuations.

STATEMENT

This case concerns the federal government's condemnation of 480 acres of petitioner Gilbert Fornatora's property, which was located adjacent to Everglades National Park. In anticipation of expanding the national parkland, the federal government recommended to local authorities that they restrict zoning to one dwelling per forty acres in Fornatora's and other abutting land. In 1981, Dade County, Florida authorities enacted this recommendation, which substantially decreased the market value of that land. In 1989, Congress authorized the expansion of Everglades National Park to include petitioner's property (along with 2,700 other parcels), and some years later, a land commission was appointed pursuant to Fed. R. Civ. P. 77.1 to determine the just compensation due to the dispossessed land owners.

Fornatora raised several objections to the valuation process both before the district court and on appeal to the U.S. Court of Appeals for the Eleventh Circuit. First, he argued that the commission had erred in refusing to apply the so-called "scope of the project" rule, which holds that project-influenced decreases in property values should not be included in valuation. The courts below rejected this argument, holding that unless Fornatora could show that the "primary purpose" behind the local zoning restrictions was to depress his property's value in advance of condemnation, the scope of the project rule did not apply.

Second, Fornatora objected to the apparent manipulation of the commission process by the government in order to artificially depress valuations. Specifically, he pointed to a repeated practice of dismiss-

ing properties from commission hearings where their owners were represented by counsel, and later reinstituting proceedings only after enough *pro se* cases had been heard to establish a lower valuation pattern. In effect, the government used unrepresented owners to establish the baseline valuation against which contested properties would be measured. The Eleventh Circuit rejected this claim without adopting any definite due process standard, but rather finding that in light of similar fact patterns in other cases, the proceedings were sufficient to "facilitate justice."

ARGUMENT

1. As this Court has recognized, "'[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat * * * (of the construction of a government project) and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned." *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961) (citation omitted). This case involves the application of that principle to a fact pattern that has split the lower courts: the federal government's inducement of land-use regulation by local authorities in anticipation of a federal taking.

Courts and commentators have long recognized the problem of "condemnation blight":

> "[I]n some cases, government functionaries have been known to engage in a process of 'softening up' owners of properties slated for acquisition. * * * [C]ities have been known to withhold trash pickup and police protection from the targeted areas. Short of that, it is common that building permits are withheld causing the targeted properties to fall into dis-

> repair, so that cities can acquire them cheaply. Or, zoning may be changed so as to lower property values in anticipation of condemnation."

Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 REAL ESTATE L.J. 47, 59–60 (1998). See also, *e.g.*, *Amen* v. *City of Dearborn*, 718 F.2d 789, 795 (6th Cir. 1983) (detailing local government's manipulation of zoning and permitting processes to artificially depress market values in anticipation of contemplated taking).

This Court's response to this problem was to adopt the scope of the project rule, which excludes from the "just compensation" calculation any change in value that was caused by the government's own conduct in connection with the condemnation project. *See, e.g., Virginia Elec. & Power, supra.* However, the Court has never explicated the standard to be applied to determine when federally-induced local regulations that diminish a property's fair market value should be considered to be within the scope of a federal project for valuation purposes.

As set forth in detail in petitioners' brief, this has resulted in non-uniform treatment of takings claims across federal jurisdictions. Compare, *e.g.*, *United States* v. *480.00 Acres of Land*, 557 F.3d 1297, 1310–1311 (11th Cir. 2009) (requiring showing that government's "primary purpose or motive" in enacting regulations was to depress property values in anticipation of condemnation), *United States* v. *Land*, 212 F.3d 830, 832 (5th Cir. 2000) (same), and *United States* v. *Meadow Brook Club*, 259 F.2d 41, 45 (2d Cir. 1958) (requiring showing that government's "sole motive" was to depress values), *with United States* v.

222.0 Acres of Land, 324 F. Supp. 1170, 1175 (D. Md. 1971) ("inducement" of regulation by federal government enough to bring it within scope of project rule) and *United States v. Certain Lands in Truro*, 476 F. Supp. 1031, 1032 (D. Mass. 1979) (regulations "motivated" and "induced" by federal government are within scope of project rule).

Similarly, state courts—which operate under the same constitutional takings and just compensation restraints as their federal counterparts, see *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1896) (incorporating Fifth Amendment's takings clause against the States)—apply widely disparate standards to determine whether particular regulations fall within the scope of the project rule. For example, in *Roth* v. *State Highway Commission*, 688 S.W.2d 775, 777–778 (Mo. App. 1985), the state court, construing Missouri's analogous takings clause, held that the State's collusion with local authorities to deny building permits on land it sought to condemn was "untoward activity" that should have been accounted for in the condemnation proceeding. In *City of Sparks* v. *Armstrong*, 748 P.2d 7, 8–9 (Nev. 1987), the Nevada Supreme Court held that a local government's precondemnation restrictions on the use of a targeted property should be excluded from valuation because those restrictions were "unreasonable or oppressive in such a manner that those activities adversely affect[ed] the market value of the property."

In *Jones* v. *People ex rel. Department of Transportation*, 583 P.2d 165, 169–170 (Cal. 1978), the California Supreme Court ruled for the property owner in an inverse condemnation action, holding that the reduction in value caused by local authorities' prohibition of subdivision in advance of an anticipated

state condemnation was compensable because it was "unreasonable conduct." And in *Lange* v. *State*, 547 P.2d 282, 287–288 (Wash. 1976), the Washington Supreme Court applied the scope of the project rule to exclude the diminution in value caused by the government's announcement of a plan to build a highway near the targeted property, where such reduction was "clearly foreseeable."

The split that petitioners have shown—as well as the widely varying standards employed by state courts—is more than simply a variation in verbal formulation. The "primary motive" test adopted by the Eleventh Circuit and some of its sister circuits is not just strict in theory; in most cases, it will be fatal in fact to landowners' claims. Especially given the limited procedural protections and mechanisms for discovery that attend a valuation commission proceeding under Fed. R. Civ. P. 71.1, it will be a rare case indeed where a condemnee will be able to produce a "smoking gun" showing that the government's expressed benign motives are wholly pretextual.

As the Eleventh Circuit itself recognized below, "[i]t is very unlikely that the Government would ever admit that its primary purpose or motive in passing an ordinance or regulation was to depress value in anticipation of condemnation." 557 F.3d at 1314; see also *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (improper motives of local land-use regulators must be inferred, because they are not likely to be openly asserted by the government). If government collusion and manipulation is shielded by such a difficult-to-overcome standard, property owners will face the "heightened risk that the purpose" of pre-condemnation regulation will be "avoidance of the

compensation requirement, rather than the stated police power objective." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841 (1987).

The fact that petitioners have demonstrated a landscape of conflicting standards rather than a crisp, black-and-white split should not deter this Court from granting certiorari. To the contrary, the patchwork quilt of inconsistent standards on the state and federal levels calls out for uniformity both as a matter of constitutional principle and Congressional policy. See *United States* v. *5.00 Acres of Land*, 673 F.2d 1244, 1247 (11th Cir. 1982) (valuation commission procedure was intended to "achieve some uniformity of result" in cases involving "large areas [of land] held by many small landowners").

Moreover, the number of reported Court of Appeals decisions on this issue understates the importance of this question. If fewer cases than might be expected have reached the Courts of Appeals, it is likely because of the prevalence of *pro se* representation among those hailed before land valuation commissions. That fact counsels in favor of searching review to ensure uniformity and fairness.

Finally, the proper construction of the scope of the project rule is a question of nationwide importance. Each year, thousands of condemnation projects at the federal and state levels result in total just compensation payments of billions of dollars. Moreover, the fact pattern in this case—the enactment of local regulations at the behest of federal authorities that are intended, at least in part, to depress land values in anticipation of a federal taking—is a recurring one. As land use regulation becomes more pervasive, and coordination between govern-

mental authorities increases, such situations will only become more commonplace. The lack of a clear and uniform standard by which to apply the scope of the project rule will only encourage further governmental gamesmanship and place the Constitution's protection of private property in greater jeopardy.

2. The second question presented by the petition—the proper due process standard to apply to a claim of governmental manipulation of the land commission process established by Fed. R. Civ. P. 71.1—is also worthy of this Court's review.

Case law has long held that courts have a duty to ensure that owners of condemned property receive a meaningful hearing into the values of their individual parcels. See, *e.g.*, *Gwathmey* v. *United States*, 215 F.2d 148, 153 (5th Cir. 1954). Indeed, given the lack of procedural protections inherent in the commission process (for example, the lack of a right to a jury trial), courts have emphasized their duty to be "particularly vigilant" to ensure that the rights of landowners are not diluted. *5.00 Acres*, 673 F.2d at 1247. Such procedural vigilance is particularly important given both the limited resources available to many individuals and small business owners facing condemnation, and the prevalence of *pro se* representation before land valuation commissions.

But vigilance is worthless if there is no agreement among the courts as to what standard of review should control their inquiries. The case below dramatically illustrates this problem. Despite a multipage analysis of the facts of this case, the Eleventh Circuit was unable to enunciate any coherent principle for determining whether the federal government's "front-loading" of unrepresented cases in order

to establish an artificially low valuation baseline offended due process. To the extent that other courts have addressed this issue, they too have failed to formulate any uniform standard.

The power of condemnation is one of the federal government's most dangerous and can be susceptible to abuse. As this Court has recognized, there is a fine line between a legitimate regulation of property and "out-and-out extortion" designed to depress the value of land in anticipation of a taking. *Nollan*, 483 U.S. at 837. Without clear and uniform procedural standards in place that permit courts to exercise the "particular vigilance" required to protect property owners' rights, that line will continue to be blurred.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari to the Court of Appeals for the Eleventh Circuit.

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